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Case and Comment

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The War Powers of the Constitution

The major war powers conferred by the Constitution on Congress are found in article I., § 8, paragraphs 11, 12, and 13. It is therein provided that Congress shall have power "to declare war," "to raise and support armies," "to provide and maintain a navy."

As directly interpretive of these, as well as other grants of power to Congress, it is provided—article I., § 8, paragraph 18—that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The nature and scope of these provisions have been under consideration and interpretation for more than a century. They have been discussed and passed upon by statesmen and jurists as able and worthy as any the world has ever seen. It will help us to clear views and sound judgment to review some of this comment and exposition.

These war powers of the Constitution were most persistently and bitterly assailed both in the convention which formulated the Constitution and in the discussion which preceded its adoption. It is a matter of history that no other powers of the government were more strongly contested than were these. That the provisions were retained in such broad and practically unlimited form after such critical and careful consideration is ample vindication of their wisdom. With full understanding of their significance they were finally approved as necessary for the security and preservation of the nation. . . .

The grant of power as particularly applying to the Army is conveyed in the words—

"To Raise and Support Armies."

The clause as originally reported was "to raise armies." The addition of the word "support" was added in the report of the committee. Over this a spirited debate occurred in the convention. It was finally adopted with full understanding of its far-reaching significance.

It was held in Tarble's Case, 13 Wall. 408, 20 L. ed. 601, that under this provision of the Constitution the control of Congress over the subject is "plenary and exclusive. It can determine without question from state authority how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned."

Mr. Tucker, in discussing the clause "to raise and support armies," says, vol. 2, page 579: "The question arose under the Conscription Act passed by the Confederate Congress during the late war whether it was competent for that Congress by conscription substantially to exhaust the material out of which the militia was composed. It was objected that this would make a standing army composed of the whole of the militia and would leave to the states no armed force to resist its power. The court of appeals of Virginia decided there was, and could be in reason, no limitation put upon the size of the army which was to be raised, and that the objection to the law was not good."

"To Provide and Maintain a Navy."

This provision confers on Congress the same powers with regard to the Navy as that with regard to the Army. . . .

Not less important than these direct grants of power "to declare war," "to raise and support armies," and "to provide and maintain a navy," is the further express declaration of the Constitution that Congress shall have power also "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

War powers are greater than other powers because war is the supreme effort of a nation. It is its utmost endeavor.—Hon. Horace M. Towner.

HON. NEWTON D. BAKER, SECRETARY OF WAR.
Shown at his desk on the eve of the War with Germany.

Case and Comment

VOL. 24 AUGUST 1917 No 3.

Precedent v. Codification

BY OTTO E. KOEGEL, LL.M.

Of the District of Columbia Bar

THE systems of jurisprudence which govern the civilized world are many, but two of such systems largely predominate. In England and the United States the common-law system prevails. In English-American jurisprudence the foundation principle is *stare decisis,*—adherence to the adjudged cases,—the doctrine of precedent. However, in the greater part of the civilized world the Roman or civil-law system prevails. France, Germany, and all of the countries on the continent of Europe, all of the South American countries and Japan, are governed by this system. In these countries they have put both their adjective and substantive law into statutory form—codification—which is their chief reliance. While not a little of the law in the Anglo-American countries is put into the form of statutes, their chief reliance for the legal principles, and the construction and application of them, is upon the reported decisions of actual cases,—precedents.

That each of these two great systems of jurisprudence has its virtues must be admitted by all, but in discussing the relative merits of the two systems, the question, which is the more desirable of the two, is a matter which occasions no little controversy. A recent President of the United States has openly expressed himself as favoring the civil-law system, and he has the approval of many. Another President of the United States has declared himself to the contrary, and, likewise, many join him in his view.

The author will endeavor, in the pages which follow, in a small measure, to unfold the virtues and also expose the vices of the respective systems, largely leaving the reader to deduct his own conclusion as to which is the better of the two. The writer cannot desist, however, from showing throughout his preference for the system used in the United States.

Precedent.

By comparing the word "precedent" with "codification" one will readily conclude that precedent antedates codification, because to put anything into a code presupposes the existence of something to codify. For example, the Justinian Code is the body of Roman law compiled and annotated at the command of the Emperor Justinian, who lived A. D. 527–565. This consists of the pandects, or the condensed opinions of the jurists, in fifty books, the Institutiones and the Novellæ Constitutiones, a collection of ordinances, the whole forming the *corpus juris civilis* or body of the civil law.

Precedent is a doctrine which belongs

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particularly to the common law of England. The unwritten or common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.[1] Lord Chief Justice Wilmot said: Statute law is nothing but the will of the legislature in writing, and the common law is nothing but statutes worn out by time; and all the law began by consent of the legislature.[2] But this does not seem to be correct. "A great portion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference."[3] In the preface to Rolle's Abridgment, Sir Matthew Hale says: "The common law is not the product of the wisdom of some one man, or society of men, in any one age, but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men." Cicero also ascribes the excellence of the Institutes to the gradual and excessive improvements of time and experience; and he held no one mind was equal to the task.[4]

OTTO E. KOEGEL.

We have seen that the doctrine of precedent, an incident of the unwritten law, existed prior to the compilation of any code. The logic of this is quite apparent when we stop to consider that sometime in the history of the world writing was unknown.

Precedent is defined to be "an adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterward arising or a simple question of law,"[5] or "a preceding action or circumstance which may serve as a pattern or example in subsequent cases; an antecedent instance which creates a rule for future determination in similar or analogous cases."[6] "Precedent is only another name for embodied experience, and counts for even more in the guidance of communities than in that of the individual life."[7] A precedent *sub silentio* is a term applied to silent uniform practice of the courts, though not supported by legal decisions. Lord Ellenborough, Ch. J., said: "It is not only from decided cases, where the point has been raised upon argument, but also from the long-continued practice of the courts."[8]

Codification.

Codification has two distinct meanings, which are often confused and misunderstood by the legal profession as well as the laity.

[1] Ch. Kent, Lect. XXL.
[2] Collins v. Blantern, 2 Wils. 348, 95 Eng. Reprint, 851.
[3] Ch. Kent, Lect. XXI.
[4] De Republica, liber 2, 1.
[5] 31 Cyc. 1157.
[6] Century Dict.
[7] Lowell, Study Windows, p. 164.
[8] Calton v. Bragg, 15 East, 223, 104 Eng. Reprint, 828, 13 Revised Rep. 451, 14 Eng. Rul. Cas. 541.

First. It is a systematic and complete body of statute law intended to supersede all other law within its scope. In this sense a code is not a mere arrangement of the existing law, but it demands the substitution of new provisions for those of the existing law which appear illogical or erroneous.

Second. A body of law which is intended to be merely a restatement of the principles of the existing law in a systematic form, hence a digest, or orderly arrangement or system.[9]

The first of these two meanings is the one being considered in this thesis.

The most ancient code known is the Code of Hammurabi or the Babylonian Code. The most famous of the modern codes is the French Code or Code Napoleon (1789). The necessity of a code in France was mainly caused by the immense number of separate systems of jurisprudence existing in that country prior to 1789, justifying Voltaire's sarcasm that a traveler in France had to change laws about as often as he changed horses. We also have the Prussian Code by Frederick the Great (1751). It was intended to take the place of the Saxon laws, and the main object was to destroy the power of the lawyers whom Frederick hoped to render useless by placing all the laws in a code.[10]

It must be borne in mind that this discussion is one of private, and not public, law,—constitutions, etc.,—which it is better to have written. Public law must exist in writing at the start, otherwise it could not exist at all. "Administrative law is proper for the legislature; the law of private rights is more properly for the court, the only place where, in the course of time, every conceivable right is earnestly asserted, strongly attacked, fully defended, fully discussed, and impartially decided." [11]

"On the one hand we are told that the legislature is the only agency clothed with the authority to make laws, and the logical deduction from this is that if upon a question arising in any particular case the statute book is silent, there is no law by which it can rightfully be determined.

"On the other hand in the greater number of instances where the statute book is silent, yet the courts are in some way able to find laws or rules by which the questions may be determined.

"To some this apparent incongruity has seemed a great imperfection in jurisprudence, and, looking chiefly to the supposed necessity or desirability that the people at large should know, and know beforehand, the laws by which their actions are to be governed, and have a participation in making them, they have insisted that all our laws should be reduced by the legislature to the form of statutes." [12]

Even those who champion the written law admit that all law cannot be reduced to writing; for after it is written, it must still be interpreted in order to be applied, and such interpretation necessarily involves a resort to unwritten rules. We may enact rules of interpretation, but even these themselves must be interpreted.

"What is law? Is it something that exists only when men create it, and as men create it, or has it existed from all eternity, and from time to time revealed itself to satisfy the aspirations or the needs of the human race? Or is it part the one and in part the other?" [13]

Law has existed for all time. Every one will agree that the laws should be just and that no man does wrong merely for the sake of doing it, but rooted in the very souls of men is the desire to do right, and no one will contend that injustice is better than justice. Justice, as well as everything that is good, may well be traced to truth. Truth is the axis around which all the other virtues revolve. Truth is eternal, has always existed. "Truth crushed to earth shall rise again, the eternal years of God are hers." [14] So, poor indeed will be the lawgiver or the judge who does not acknowledge that he is not a maker, but a seeker, of pre-existing truth. Lord Mansfield said: "The law does not con-

[9] Century Dict.
[10] 7 Enc. Britannica, 11th ed. 633.
[11] Rush, Eq. Pl. & Pr. 5.
[12] Taylor, Province of Written and Unwritten Law.
[13] Ibid.
[14] William Cullen Bryant.

sist of particular cases, but of general principles which are illustrated and explained by those cases." This means that though we loosely speak of decisions as constituting the common and equity law, it would be more exact to speak of decisions as only illustrating, applying, interpreting that law, which really consists of unwritten principles pre-existing and established in the common conscience and usages of the people.[15]

This is further borne out by the Hebraic tradition that the laws which the children of Israel were bound to obey were proclaimed amid the thunders of Sinai before they were written on tables of stone.[16]

The object and end of laws, says Demosthenes, "is to ascertain what is just, honorable, and expedient. This is the origin of law, it is the invention and gift of the gods."[17] And the words of Cicero rise into sublimity when he uses such a theme. True law, says he, "is right reason, conformable to nature,—universal, unchangeable, eternal,—whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Athens and another thing at Rome; one thing to-day and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God Himself is its author, its promulgator, its enforcer."[18]

"A judge does not intend to create a principle of law. It is his official function, by his opinion, to endeavor to show what existing principle of right governs a particular set of facts. Our common law was not, and cannot be, made or unmade by the enactment or pronouncement of any man or aggregate of men, however powerful."[19]

"The common law compares with enacted law (statutes intending to cover the whole or a large part of the subject of private rights), as experience and fact compare with experiment and belief. Statutes are not necessarily in accordance with fundamental truths, facts, principles; they are concrete demands enacted by fallible men. They may be arbitrary, and not based on true reasons, true facts. Unlike common-law decisions, statutes are not tentatively expressed by later decisions. Human expressions are seldom exact, adequate, or properly limited. The expression of enacted law stands more rigid and fixed by its letter, because the language of a statute can be changed only by legislative amendment, and at a place where those whose rights are affected cannot be heard. Statutory language cannot be corrected by courts, though actual cases may plainly show the language is too broad for what was probably intended."[20]

We have seen that the function of the judge is to seek, and not to make, the law. But would it be well to put all the law on statute books in order that the judge might seek it there? Such a position is not without its plausibility; but let us stop to consider that the function of the judge is "not only to imbue himself with the principles of abstract and theoretic justice, but to become familiar with the limitations of these principles springing out of the nature and constitution of men, their passions and tendencies, their ignorance and weaknesses, their occupations, cares, and anxieties, thoughts, studies, and aspirations."[21] He must know how the principles of justice have been before applied, both by the people at large and by the cultivated few.

It is obvious to all that the judge cannot be perfect, as "no perfection is so absolute that some impurity doth not

[15] Rush, Eq. Pl. & Pr. 2.
[16] Exodus, chap. xix.
[17] Orat. I. Contra Aristogit.
[18] De Republica, liber 3, 22.
[19] Carter, Law, its Origin.
[20] Rush, Eq. Pl. & Pr. 6.
[21] Taylor, Province of Written and Unwritten Law.

pollute."[22] But could all law be put in books and the chances of imperfection be less than by leaving it largely to the courts,—precedents? It would seem the greater injustice would be worked by defining the rights of men in an inflexible, written code. It is much easier to formulate a rule to meet every exigency and emergency than it is to add compendiums to cover exceptions to the rule itself. That eminent Chancellor, Lord Hardwicke, in stating that no practicable definition could be found for fraud, assigned as his reason: "It would lead to endless schemes and devices to which the fertility of man's invention would contrive."

In considering the question thus raised, it is quite natural that one of the first inquiries be, What advantage would be gained by the suggested change? If none, then why the labor and expense? Those who insist upon the codification of all private law say it is but just that if men are to be compelled to obey laws, they should know, and know beforehand, what they are bound to obey, so that they may regulate their actions in accordance therewith, but as it is now, they do not know where to look for the law, otherwise than by consulting a lawyer, and that this is often impracticable and always unjust. But if all the laws were written and codified, would the difficulty be wholly removed? Many would be unable to read them, and many more would be unable to understand them, and many more would neglect to read them or even try to read them. As we all know, the great majority of people do not read the laws which are written, and when a layman wants to know the law, he will seek professional advice whether the laws be written or unwritten.

Another thing insisted upon by the champions of codification is that written law is superior to unwritten law in that the former is more certain. But is it more certain? That uncertainty in written law is frequent we have no less an authority than Cicero. He says: "Let us then once more examine, before we come to the consideration of particulars, what is the power and nature of law in general, lest when we come to refer everythng to it, we occasionally make mistakes from the employment of incorrect language, and show ourselves ignorant of the force of those terms which we ought to employ in the definition of laws."[23] Chancellor Kent, in his very copious manner, says: "It would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations." Lord Coke complained in his great day that questions had oftentimes arisen "upon acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." "Various and discordant readings, glosses, and commentaries will inevitably arise in the progress of time, and perhaps as often from the want of skill and talent in those who comment as in those who make the law. Though the French Codes, digested under the revolutionary authority, are distinguished for their sententious brevity, there are numerous volumes of French reports already extant, upon doubtful and difficult questions arising within a few years after these Codes were promulgated. From the time of the French Revolution, down to 1828, there were 100 volumes of statutory law made in France."[24]

Let us take the case of a deed at common law when it was necessary to use the technical word "heirs" to convey a fee-simple estate. Suppose an estate is given from "A" to "B," but in the conveyance the technical word "heirs" is in the singular number, just "B and his heir." In an actual case the court gave the grantee a fee simple.[25] The reason is obvious, as it would shock the common sense of anyone to suppose the contrary. Now suppose there was but one place to find the law, in a code, and in that code it expressly stipulated that the

[22] Shakespeare, Lucrece.
[23] De Leg. bk. 2, IV.

[24] Lecture XX.
[25] Ld. Ch. J. Eyre, Dubber ex dem. Trollope v. Trollope, 1 Ambl. 453, 27 Eng. Reprint, 300.

conveyance must be to one and his "heirs." In such a case could the court say, This is a substantial compliance? No! And what a howl would we hear that justice was defeated by a technicality. We hear it often enough to-day, but how much more would it be heard if the lawmakers were to try and anticipate circumstances and lay down a hard and fast rule for subsequent cases. It was a maxim of the Romans that *summum jus* or the rigor of the law was the height of oppression.

Let us suppose the example where an infant is being sued *ex contractu*. At once we think of infant's contracts being voidable. Then let us suppose that it is insisted that the infant's contract is one for "necessaries." At once we conceive the rule that an infant is bound to his contracts for "necessaries." But what are necessaries? As we know, what is necessary for one is not always for another, but each infant shall be entitled to what is "necessary to his station in life." Can the legislature provide in this instance, which is but an infinitesimal part of the vast field of the law, and provide adequately, for the station in life of every infant, born and unborn, who may become a party to such a contract? It would seem not. "Pronouncing what is right or wrong under the varying facts of different cases is best done by courts, the governmental agency established for the purpose." [26]

Suppose we did codify all the law, what about the new cases that might arise? What did the judge do to whom the first case was submitted where a contract was made by an infant and ratified after he became of age? He observed that it was an infant's contract. It was therefore assignable to the above-mentioned class of contracts, but he noticed the ratification after he became of full age. He found that none of the preceding cases presented this feature. The action of his predecessors supplied him with no controlling guide. He saw the new feature was a very material one; that the original consideration was perfect, and seeming in no wise unfair to hold him liable, he held the infant bound. This could not have been done were there no common law to be applied.

The court in the Earl of Oxford's Case well observes, in defining chancery, that "men's actions are so diverse and so numerous that it is quite impossible to form any given rule which would aptly meet with every circumstance and not fail in some cases. It is therefore the duty of the chancellor to correct men's consciences for frauds, breaches of trust, and other wrongs and oppressions of what nature so e'er they be, and to soften and mollify the extremity of the law which is called *summum jus*." The court there distinctly recognizes that written law is bound to fail in countless instances. Again we have Cicero as an authority: "The limits of justice are not so fixed, but that they may be altered by an alteration of circumstances; so that what at one time appears to be the duty of an honest and good man, at another is altered and becomes quite the contrary." [27] How often do we hear good lawyers remark that it is not so difficult to ascertain what the law is as it is to apply it to a particular state of facts? "Respect for prior decisions prevents arbitrariness, and compels lawyers and judges to scrutinize the reasoning of prior similar cases. Prior decisions bring before each judge the light, the reasoning, and the learning of preceding ages." [28]

If a former decision is manifestly unjust, it is not law, says Blackstone,[29] and such a prior decision may be departed from by other judges who usually point out the error in their opinions.

We see, then, that it is impossible to write the law which shall justly govern future acts because we do not know the nature of those acts yet to be. As we are imperfect, we, of necessity, at times fail to discern the truth of the present. So, in a greater measure do we err in our efforts to ascertain the truth of days gone by, as all testimony grows weaker and weaker as it is more and more remote from us, and who is going to say that we may testify as to what shall happen to-morrow? No man knows what

[26] Bl. Com. 66.
[27] Cicero, The Offices, X.
[28] Rush, Eq. Pl. & Pr. 2.
[29] Bl. Com. 70.

the morrow may bring forth, saith the Scriptures.[30]

We have seen that true law and justice are eternal and have always existed; that it remains for man to ascertain the best he can just what true law and justice are. "Courts are not sovereign and supreme; our legislatures are not supreme; only fundamental principles of law are supreme."[31] Many men will harp at the uncertainty of the law as if it were the fault of lawyers, judges, or even the system of jurisprudence. Where are we going to find this certainty; in a code of morals, in politics, in religion? Certainty of the present is doubtful; certainty of the future is more of an absurdity.

We have seen that to define the private rights of men in an inflexible, written code will often defeat the ends of justice. This is no less true in regard to a penal code, and we have some striking examples. The examples may be multiplied, but it will suffice to cite but two of them.

The state of Ohio provided that crimes and misdemeanors shall be defined, and the punishment thereof fixed, by statutes of this state, and not otherwise. The Code was silent as to the crime of rape on children under the age of consent, and it was held that a man who attempted to have carnal knowledge of a girl under ten years of age, with her consent, was not guilty of a crime, because there was no statute against it.[32]

The state of Iowa also undertook to formulate a complete penal code, and abolished common-law crimes. A man was indicted for the crime against nature, that awful crime which Blackstone says is not fit to be named among Christians, and which the voice of nature and of reason, and the express law of God, determined to be capital.[33] The Iowa court acquitted him because the legislature failed to name it in the Code.[34]

The author will not be so disagreeable as to dwell further upon a subject, the very mention of which is a disgrace to human nature. Nor does he deem it necessary to point out the vice in the aforesaid legislation, which is too obvious to question.

We have seen that if we codify all the law, it will continually take us back to interpretation as well as application, to peculiar circumstances and facts. To provide for all of the limitations and exceptions to the rules of law would, indeed, require a mighty temple to house the volumes containing them. Insisting, then, that it is impracticable to codify all the laws, we are immediately confronted with the question, "Did not Justinian do it?" "What about the Code Napoleon, and what about the greater part of the civilized world being governed by such a system?" It is generally admitted that the Code Napoleon is the best example we now have of it, and, perhaps, the best example ever attempted. Now, the question asked in reply to those interrogations is, "Is French law superior to our own, and would you be willing to trade?" One of the foremost advocates of the codification idea admits English law as being superior to that of France. He says: "The greatest possible uncertainty and vacillation that have ever been charged against English laws are little more than insignificant aberrations when compared with what a French advocate has to prepare himself for when called on to advise a client."[35] And Austin, who is generally regarded as one of the foremost champions of codification, confesses his inability to find anywhere in human experience a successful example of it. The idea seems to be with those who think as Austin, that, notwithstanding the fact that no successful code has ever been written, it is not impossible to write one. But human affairs are not guided so much by possibilities as practicabilities. And I ask, dear reader, is it not of some significance that hundreds of codes have been attempted and none of them have been superior to the common law? The eminent Mr. Austin has not only admitted that no code which has been written would better serve the needs of hu-

[30] Proverbs xxvii. 1; James iv. 14.
[31] Herbert Spencer, Social Statics, 376-411.
[32] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.
[33] 4 Bl. Com. 215; Leviticus, xx. 13-15.
[34] Estes v. Carter, 10 Iowa, 400.
[35] Amos, An English Code, p. 125.

manity than the common law, but he has failed to show us a single instance where it has been equal to the common law, and Mr. Amos conceded the superiority of the common law to the Code Napoleon.

Probably the greatest champion of codification was Jeremy Bentham.[36] He was very outspoken in favor of the system, and came out with the courage of his convictions. He said: "All plain reading; no guesswork; no argumentation; your rule of action—your lot under it lies before you." In a letter addressed to the people of the United States he said: "Yes, my friends, if you love one another,—if you love each one of you, his own security,—shut your ports against our common law as you would shut them against the plague. Leave us to be ruled—us who loved to be thus ruled—by that tissue of imposture." [37]

Here is Mr. Bentham's view as how to preserve the code: "It will be necessary to forbid the introduction of all unwritten law. It will not be sufficient to cut off the head of the hydra; the wound must be cauterized that new heads may not be produced. If a new case occur, not provided for by the code, the judge may point it out and indicate the remedy; but no decision of any judge, much less the opinion of any individual, should be allowed to be cited as law until such decision or opinion has been embodied by the legislature in the code." [38]

Here we have each and every case falling under the code to be decided according to the inflexible rule of such code, whether such case is an exception or not; new cases not provided for by the code are not to be decided at all! Where is the maxim, "Ubi jus ibi remedium?" Where is Justice? But the Benthamites will say, Amend the code. But the mischief is done. Even for this reason alone the system we are now governed by is superior to the innovation supposed. Bentham follows up his previous statement and says: "Are not transactions of men substantially repetitions of each other? And therefore will not rules drawn from a classification of known facts work out justice in nearly every instance, leaving the occasional miscarriages so small in number as to amount only to one of those minor imperfections from which no human institutions are exempt?"

Such a statement as the one above would indicate that its author must have lived far from the strife of this busy world. If Mr. Bentham could come back to the world and see our New York and Chicago; see the aeroplane, the wireless telegraph; hear the phonograph; and see the marvelous move forward in but the last half century, he might be induced to revise his statement. And does he stop to consider what a tremendous task it would be merely to collect rules pertaining to every act which has gone before, every known fact? Would it aid in a large measure the busy layman to get a knowledge of the laws?

Both systems, it has been said, are based upon the wisdom of the past, "but unwritten law uses that wisdom as a guide; written law erects it into a dictator. The one is in chains, the other is free." [39]

The notion that society has reached a state of rest, and that all acts are in substance but repetitions of yesterday's, is a vain illusion indeed.

Having now compared our present system of jurisprudence to the one proposed, codification, it is only fitting that some of the merits of our present system be proclaimed.

First. The guaranties of its accuracy are nearly complete. Men learned in legal matters, animated by many desires to successfully maintain their contentions, will leave no stone unturned that appertains to the justice of the cause. Argued before a justice or judge selected for his skill and learning, and his decision subject to review by a superior tribunal, the case will be scrutinized and weighed most carefully, and the final decision will, as far as human intelligence is capable of correct conclusion, be sound.

[36] English jurist and philosopher, 1748–1832.
[37] Bentham's Works, Edinburgh, 1843, vol. 4, p. 504.
[38] Bentham's Works, Edinburgh, 1843, vol. 3, p. 209.
[39] Taylor, Province of Written and Unwritten Law.

Second. Progressive, yet the change is gradual and unperceived.[40] Where the development of the law remains under the guiding hand of men learned in the law instead of being given over to a legislature which is largely incompetent,[41] we will have a system which carefully and gradually takes care of itself, "free as truth itself to grow; a treasure house of fundamental truths, its sound precedents ever correcting, improving, and enriching the language of the law; its unsound precedents pruned away in time," [42] and never denying a remedy to the wronged and oppressed merely because the act complained of does not come within the purview of a hard and fast written rule. The members of the legal profession alone are able to contrive the methods by which the administration of justice can be best secured. Sciences can be advanced only by the labor of experts, and we are the experts in the science of the law.[43]

Lastly, why not let well enough alone? We have seen that no improvement would be made by the adoption of codification, and that it is a dangerous experiment. It presents at least as many and in all probability more evil aspects than the common law. So, in the words of Bacon, "as the births of living creatures are at first ill shapen, so are the innovations which are the births of time; so the first precedent (if it be good) is seldom attained by imitation." [44]

"And set it down to thyself as well to create good precedents as to follow them."

Otto E. Koegel

[40] Ibid.
[41] Kent, Lect. XX.
[42] Rush, Eq. Pl. & Pr. 10.
[43] Taylor, Province of Written and Unwritten Law.
[44] Bacon on Innovations.

Thy Brother and Mine

Thru curtains of fire, in a fearsome hell,
Where rivers run red with the blood that's shed,
As death leaps unchained from each bursting shell,
Goes my son and thine—thy brother and mine.

Down into the shadow, under leaden skies,
Facing the hail of death, with deep-drawn breath,
Paling and gasping as a comrade dies,
Goes my son and thine—thy brother and mine.

Freedom's star-gemmed banner leads the way
With its scarlet bars and its shining stars,
As fighting for right and the dawn of day,
Goes thy son and mine—my brother and thine.

Triumphant, glorious, the flag will wave,
When the fight is won and the duty done,
Until time shall end, for our nation brave
And thy son and mine—my brother and thine.

Casper, Wyo. E. Richard Shipp.

Modern Business Organizations

BY S. R. WRIGHTINGTON

of the Boston Bar

Author of "The Law of Unincorporated Associations and Similar Relations."

THE most striking aspect of business in the last century was the growth of co-operative enterprise. With this combination of the capital of many individuals has also come the conception of limitation of individual liability to the amount of capital put at the risk of the enterprise. When this principle was first applied the only agency which the common law afforded for its development was the corporation, a conception of an artificial personality created by grant of the sovereign. This fiction of the law had originated in the corporation sole of the church and in municipal organization. The earliest co-operative business organizations, such as the East India Company, had been overgrown partnerships, applying to the company on a large scale the only rules of law relating to commercial organization with which the courts were then familiar; namely, that law of partnership which had been developed in the eighteenth century from the law merchant of continental Europe. The characteristic of the partnership is unlimited individual liability.

The corporation, which has been adopted as the vehicle for modern co-operative finance, is appropriate for public or quasi public enterprises; that is, enterprises that are public either from the nature of the service, as, for example, a business involving the use of a public franchise, or from the size or scope of a business which results in a virtual monopoly. Such enterprises are appropriately regulated by the states which create or permit their existence, and it was in enterprises of this nature that the corporation was originally employed for other than religious or municipal purposes. The last generation, however, saw the corporation adopted for small and private undertakings. This occurred because of the natural desire of business men to limit the risk of the business to the capital appropriated by them to it. To avoid the evils of special legislation general corporation laws had previously been passed by our legislatures, and these enabled the speedy adoption of the corporate form for purely private and often individual business. In theory, artificial personality was conferred by the sovereign. In fact, limited liability was established by private individuals merely by public declaration of their intention.

The growth of large corporations produced abuses which resulted in corrective legislation. We have just been passing through a period, not yet ended, of strict regulation of corporations. We are now entering upon a period of severe taxation of corporations, due to a change of theory as to the best method of passing on to the public the increasing cost of government. Instead of collecting revenue indirectly through a tariff, we are collecting it indirectly through the corporations. Regulation and taxation must apply to private as well as public corporations, big as well as little, for an arithmetical classification of corporations subject to regulation or taxation would be too easily evaded by those for whom the rules and the taxes are really meant. The result of all this, however, is that purely private and frequently individual enterprises are subjected to embarrassing restrictions and increasing burdens which are appropriate only for quasi public business concerns.

Business men are naturally casting about for a different method of commercial organization. One alternative is to attain limitation of liability by agreement, express or implied, between the enterprise and its creditors. The time may come when the courts will imply such an agreement from the nature of the dealings. Why should not limitation

of liability to capital put at the risk of the business be a normal, rather than an abnormal, theory of business? In fact, through the artificial device of corporations well night universally it has become the usual method of doing business. Business men extending credit have become accustomed to eliminate the idea of individual credit except when the individual name is that under which the business is conducted. "The Boston Company" or "The Boston Trust" at once suggests limited liability. When once this is recognized, the courts will doubtless declare that limitation of liability by agreement is implied in dealings with such an organization. That time has not yet come, or we cannot be sure that it has, which for the purposes of counsel amounts to the same thing. The multiplication of corporations since 1850 overshadowed a different development from the large partnership. Associations were formed, which, to avoid uncertainties in the application of the law of property, vested their assets in trustees who issued transferable shares representing the capital contributions of the investors. These trusts became common in Massachusetts for the purpose of real estate development because of restrictions on the real estate holdings of corporations. A crude form of the same type of organization was adopted for certain early attempts at monopoly in Ohio and New York, which soon attached a connotation of opprobrium to the name "trust," which is still confusing. This type was then generally abandoned, except in Massachusetts, where its application was broadened from real estate development to holding companies, and even to ordinary manufacturing enterprises. The great desideratum of limited liability was sought by various devices, some of which have proved illusory.

S. R. WRIGHTINGTON.

One method, however, is unassailable either in law or in morals. If liability is limited by agreement, express or implied, between the organization and those who extend credit to it, the end is effectively attained and no one can possibly be harmed. In small or closely held concerns this method is often workable. The one danger is that in times of stress a shareholder cannot be sure that the executive of the association will consistently obey his orders to frame his agreements so as to limit liability, and, furthermore, unexpected liabilities are sometimes imposed by force of law to which no limitation by agreement can attach. There remains one form of organization which eliminates effectively the possibility of personal liability, namely, the trust. Our judges have not clearly agreed just how to distinguish partnership from trust; that is, they are not yet sure just where to draw the line. Uncertainty for a lawyer advising a client is worse than an adverse decision. Hence lawyers have hesitated to adopt the trust form for co-operative enterprise because of this twilight zone still existing between trust and partnership in these cases. We may, however, feel sure of some things. An organization can be formed which will be safely within the line which is being drawn. Although the preparation of the declaration of trust of a modern business trust with transferable shares is a work that should be attempted only by a skilled draftsman, when the investor has assured himself that the papers were prepared under the direction of competent counsel he need consider only a few

differences from the corporation with which he is now familiar. In the present state of the decisions it seems essential that the investor or shareholder abandon some of the powers theoretically belonging to the shareholder in a corporation, such as the power of exercising control over the executives of the organization through voting at meetings of stockholders.

Will such a form of organization accomplish the desires of business men, that is, will it be workable? There are two sorts of investors,—those who desire and will exercise supervision over those in executive charge of the enterprise, and small investors who in fact never care to exercise their franchise as stockholders of corporations. The latter will be equally satisfied with a stock certificate which confers no voting power. The former group are usually personally, or through their intimates, directors of the corporation. It is clear that they will not be permanently content with a form of organization in which they abandon what they have been accustomed to consider the control of the policy of the corporation through their voting power. They will want the power at any time to influence the policy of the organization.

In most instances, however, it will be easy to accomplish this by making them or their representatives trustees of the enterprise. While it has been customary to have a small number of trustees, there is no reason why the number should not be sufficiently large to afford proper representation of all active and large financial interests in the enterprise. If they are thus represented on the board of trustees they will be content with an organization which completely surrenders control from the shareholders to the executives. A self-perpetuating body of trustees who can be changed only by decree of court for misconduct or neglect, but upon whom the penalties for such misconduct or neglect are at least as great as those imposed upon directors of corporations, should satisfy both classes of investors. The possibility of changing them through a decree of court is practically as good as that which the ordinary minority stockholder has of changing a board of directors of a corporation. The details of the work of the trustees may be delegated to a small executive committee, and under the provisions of the instrument of trust the liability of the trustees may be made several, and not joint. If the organization in question is clearly a trust, it is equally clear that no individual liability can fall on the beneficiaries for the acts of the trustees. It is easy to provide for the elimination of the liability of individual trustees for their deliberate acts, for self-interest will cause them to stipulate against individual liability and confine liability to the trust estate. Liability imposed involuntarily will be for misconduct, and in that event there is no good reason why the executives themselves should not be individually liable. As directors of corporations they would ordinarily subject themselves to some form of individual liability. The widespread interest that has been aroused of late in organizations of this type shows how rapidly these considerations are commending themselves to investors.

S. R. Wrightington

Litigation Under Workmen s Compensation Laws

BY ARTHUR B. HONNOLD

of the St. Paul Bar

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SINCE man emerged from his prehistoric state, caught his first glimpse of civilization, and began to make laws, conscientious legislators have been endeavoring to so fix and define human rights and rules of conduct as to eliminate controversy. But the law is yet to be enacted which will eliminate litigation on the subject with which it deals. It is probably too much to expect such a law before arrival of the legal millennium. As a rule, each statute, however carefully drawn, however simple and clear the language used, becomes the storm center of litigation soon after its enactment. The first attack is usually on the ground that it is unconstitutional. Opposing counsel give different meanings to each material word and phrase, and differ as to the application of the law to a particular state of facts. In this they are justified, since the client of each is entitled to whatever the law gives him, and presumably has acted and contracted in reliance on the correct construction and application of the law. To deprive him of a judicial determination of his rights under a statute would deprive him of his day in court and be repugnant to our free institutions. The fact that new laws are, in the main, re-enactments, with modifications and improvements, of existing laws, or are patterned after laws which have been tried and construed by the courts of other states or countries, would seem to lessen litigation. But the ever-increasing number of judicial decisions refutes this view.

By Workmen's Compensation Laws, a more equitable adjustment of certain relations between capital and labor has been sought. The cost of breakage and repair of machinery in the workshop and the factory is naturally and justly added to the price of the finished product. It is but just that the cost of breakage and repair of the human machine should be likewise added. But despite an innate consciousness of the justness of this principle, which must find recognition with every thinking man, be he employer, employee, or merely an indirectly interested member of society, there sprang up with the increase in the use of dangerous machinery and in the number of accidents, both avoidable and unavoidable, various limitations making it more difficult for the employee to secure reimbursement for injuries having a direct relation to his employment. These limitations led to constant friction between employer and employee, encouraged the employer to believe that he had a good fighting chance to win every suit brought against him for injuries to his employee, and so discouraged the employee, or made recovery so doubtful, that, through his own volition or through necessity, he bartered away a large part of his recovery to secure the services of an attorney. The average result was unsatisfactory to all parties. The few verdicts recovered by employees were either ridiculously small, or were so excessively large as to threaten the employer with impoverishment or justify reversal on the ground that the jurors were influenced by passion and prejudice. Cases were made to turn against the employee on apparently insignificant facts tending to show that he had assumed the risk of the particular injury, or was contributorily negligent, or

that his injury was due to the negligence of a fellow servant operating through no fault of the employer. The lawsuit became a mere game of chance, though controlled in part, it is true, by these limitations based on precedents not founded on a just recognition of human rights in view of present industrial conditions. Money which should have been paid to the injured employee or his family, to keep them, in many cases, from want and from becoming charges on society, was paid out for court costs and attorneys' fees attendant on long-drawn-out litigation, or was expended for insurance which the employer found it necessary to carry to maintain his financial credit. I am not among those who condemn all contingent fees, or say that even an advance of money by an attorney to his impoverished client for humanity's sake, and to tide him over pending vindication of his rights, is wrong, but I do say that the vicious system of ambulance chasing, contingent fees, and maintenance, which was the outgrowth of the common-law rules of negligence, cannot be too severely condemned. No doubt some otherwise reputable attorneys felt forced by competition to engage in these practices, but the great body of attorneys were deprived by a strict adherence to professional ethics of the opportunity to represent worthy employees. There are few lawyers who, viewing the matter from a professional standpoint as well as from the standpoint of good citizenship, will not welcome such a change in the situation as will enable them to represent employees without adopting the tactics of the shyster to secure and hold their cases. Those accustomed to represent employers will particularly welcome any change which will lift this class of litigation to a higher plane.

ARTHUR B. HONNOLD.

How does the Workmen's Compensation Law, as usually framed, affect this situation? It permits recovery of a definitely ascertainable amount, free from the usual common-law defenses, in case of injury to an employee by accident arising out of and in the course of the employment, except where the injury is intentionally self-inflicted, and thereby dispenses with questions of fact which have given rise to the most troublesome litigation, and the determination of which against the employee, though in accordance with established precedent, has worked a manifest injury to the employee and to society in general. While a multitude of questions remain and must arise from conflicting evidence and the great diversity of facts, they are questions such that a wise determination must appeal favorably to one's sense of justice.

Opportunity for speedy trial and settlement is given by the establishment of special tribunals and a provision that their findings of fact shall be conclusive. That their decisions are, in fact, not always conclusive in the strict sense is evidenced, however, by the great number of cases reported annually, the number each year greatly exceeding that of the preceding year.

Each compensation act in turn is challenged as unconstitutional. Only a few

have failed to withstand this objection. The Miner's Compensation Act, enacted in Montana in 1909, was held unconstitutional as depriving the employer who paid compensation of the equal protection of the laws, in that it did not protect him from being sued and compelled to pay damages in addition. In Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162, which has been frequently cited and discussed by courts of the various states which have adopted compensation acts, the earlier Workmen's Compensation Act of New York was held unconstitutional for the reason, among others, that it deprived the employer of property without due process of law; and later in Jensen v. Southern Pacific Co. 215 N. Y. 514, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286, L.R.A. 1916A, 403, it was pointed out that this act failed to distribute the burden equitably over the industries affected. The Kentucky Workmen's Compensation Act of March 21, 1914, which was compulsory on both employer and employee, was held to be in conflict with a provision of the Constitution of that state which prohibited the legislature from limiting the amount recoverable for injuries or death. New acts since enacted in these states have been upheld. Every conceivable objection has been made to the various acts, but the courts have viewed them in the light of modern conditions, rather than those conditions under which the common-law doctrines were developed, and have determined that the state was competent in the promotion of the general welfare to require that both employer and employee yield something toward the establishment of a plan of compensation for their mutual protection and advantage.

The principle on which the Workmen's Compensation Laws are founded has not been free from attack. This principle, of purpose, has been stated to be to abolish the common-law system relating to injuries to employees as adequate to meet modern conditions and conceptions of moral obligations, and substitute therefor a system based on a high conception of man's obligation to his fellow man, a system recognizing every personal loss to an employee which is not self-inflicted as an element of the cost of production, to be charged to the industry rather than to the individual employer, and liquidating in the steps ending with consumption, so that the burden is finally borne by the community in general. In a communication which I recently received, the application of this principle to gold mining was questioned, the contention being that though it may be all right as applied to other employments, it is all wrong when applied to gold mining, inasmuch as gold is the standard measure of values and is fixed in price, and the employer, therefore, cannot add the cost of compensation to the price of his finished product.

Simple as are the words, "injury," "accident," and "employment," and the phrases, "arising out of employment" and "arising in the course of employment," the application of each under different facts gives rise to an ever-increasing number of cases. The determination of who are dependents offers another fertile field of litigation. Any attempt to define common terms is not unlikely to result in less fairness while seeking greater clearness. For example, the Wisconsin act provides that compensation may be awarded to those dependent on the deceased employee, without defining "dependents." In that state an infant was taken into a family and treated as a member thereof without being adopted, and at the time of her death by accident, occurring while she was employed, was contributing to the support of the family. Compensation was awarded in Julien v. Milwaukee Electric R. & Light Co. 2 Ann. Rep. Wis. Indus. Com. p. 65. The Kansas act contains a similar provision, and, with the apparent intent of avoiding controversy, but covering all worthy cases, defines "dependents" as including members of the workman's family, and "members of the family" as including, among others, those in the relation of parent and child by "legal adoption." In a recent Kansas case (Ellis v. Nevius Coal Co. 100 Kan. 187, 163 Pac. 654) parallel on the facts with the Wisconsin case, the court was compelled by the statute to refuse compensation to those claiming as dependents.

In case of doubt, the prevailing rule has been to construe Workmen's Compensation Acts liberally to permit recovery of compensation. But a question has been raised even as to the application of this rule, which, no doubt, was prescribed with a mind to the interest of the employee which these laws have primarily in view. An employee denied that he was under the Compensation Law and sought to recover by an action for damages, whereupon the employer claimed that plaintiff had mistaken his remedy, his remedy being under the Workmen's Compensation Act, and now seeks to have the liberal rule of construction applied in the form above stated. The question arises, Is the employer entitled to avail himself of a rule prescribed for the benefit of the employee?

No compensation law is perfect. Some allow inadequate compensation. Some, it is claimed, allow such small attorneys' fees as to hinder the employee in his endeavor to secure the best legal talent. Very uncomplimentary language has been exchanged between the advocates and enemies of state insurance. But whatever the defects in particular laws, this legislation is right in theory, and is here to stay. It is now firmly imbedded in the jurisprudence of more than two thirds of the states, three territories, and the Federal government. As lawyers, administrative officers, and courts become more and more imbued with its spirit, and come to a full realization of the legislative intent to uproot and discard the antiquated system based on negligence and substitute therefor a system under which compensation is awarded without regard to ordinary fault of either employer or employee, the results will become more satisfactory. Even the increasing amount of litigation serves a good purpose in pointing out deficiencies to future legislatures. It may be confidently expected that they will learn therefrom, and gradually so improve these laws as to make them effective in the highest degree to carry out their beneficent purposes.

Arthur D. Hornold

To America

Thou didst love peace, but not beyond all price:
Thou dost not spurn war's solemn sacrifice.

And oh! how oft to thee hath England turned,
To seek the sign for which her spirit yearned.

How long she hath gazed out across the deep,
To see the sacred fires to heaven leap.

But now, behold! brothers in arms and blood,
Shoulder to shoulder we at length have stood.

To one sure end, one spiritual goal,
We bend our bodies, and we school our soul.

Lo! one in passion, in one passion blent,
These little Isles and that vast Continent!

London, England. E. Vine Hall.

The Medical Expert

BY LOUIS JAMES ROSENBERG

Of the Detroit Bar

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IT IS the belief of some members of both the medical and legal profession that one can get medical experts to testify to anything one wishes, as long as one pays them for it. Unfortunately, it has been proven that this belief is not wholly without foundation.

Indeed, I am ready to admit that there are physicians against whom this charge could truthfully be made. In fact, so often has this been demonstrated that judges have intimated that particular expert testimony adduced before them deserved very little credit. This view has been announced from the bench by circuit courts and by most of the supreme courts of the different states, and even in the Supreme Court of the United States. In a celebrated case, McCormick v. Talcott, 20 How. 402, 15 L. ed. 930, a justice of the Supreme Court of the United States characterized expert testimony as "reveries." A well-known jurist of Detroit is reported to have said: "There are three kinds of liars,—ordinary liars, damn liars, and medical experts."

THE AUTHOR.

It is equally true, however, that there are thousands of physicians who could not by any stretch of the imagination be guilty of such a charge. Indeed, I believe that the great majority of the physicians are honest and honorable. I also believe that the majority of physicians take great pride in their profession. Moreover, I have no hesitation in saying that the vast body of the legal profession will agree with me that, notwithstanding all the adverse criticism, which, to a large extent, is justifiable, medical experts are of immense assistance in the ascertainment of truth. I am, however, of the opinion that the ends of justice could be better served in most cases if the medical experts were called by the court instead of by the counsel, who has an interest in making the expert testimony aid his own side of the case. Medical experts indeed ought to be part of the court, adjuncts to the judge and jury, and not partisan assistants. Their employment by the courts would discourage temptations to favor any particular side of the case, and would place medical experts in a much more digni-

fied position. Some may think this idea somewhat revoluntionary, but this is the practice of our probate court in insanity cases. In that court the judge appoints the medical experts, who examine into and report upon the sanity of the party, and it has been found to work well. The opinions of the medical experts thus appointed are accepted by all parties concerned. Why should not this practice be extended to other courts? If it works well in the probate court, why will it not work well in every court?

Upon close examination, it will be found that there is nothing particularly revolutionary about this idea. The application of it in all our courts would only be an extension of a practice already in existence. I do not know how much favor it would meet with among the rank and file of the medical and legal professions, but personally I believe it would be a great improvement upon the system now in vogue.

There is no doubt in my mind that the application of the method suggested would be a wholesome reform. But whether this reform be inaugurated or not, whether the expert be called to testify upon the request of the court or that of counsel, his testimony always brings with it a solemn duty and a great responsibility, for the medical expert is to give evidence and information regarding matters beyond the reach of ordinary observation and intelligence. He is to give his opinion regarding things about which he has a practical and special knowledge. The court is dependent upon the medical expert for certain information, and hence the expert to an extent exercises the function of court and jury. The subjects upon which he is to testify affect the three great interests men most value, *viz.*, property, reputation, and life. It lies within his power to further the ends of justice or to thwart them.

Whether his testimony be regarding the health of a patient or whether it be regarding the absence or presence of poison in the stomach, whether he is to give his opinion concerning certain conclusions of science inferred from certain experiments, or concerning the probable cause of the death of a person, or any other medical facts observed by himself, or facts observed by other parties who have testified in the case,—he must ever and always be conscious of the solemn duty that rests upon him to give his testimony without bias and without prejudice.

Furthermore, the more prominent the physician is, the more important it becomes that he should tell the whole truth. The greater the expert, the greater his obligation. His name, his reputation, and his standing carry great weight. He must be careful not to use his standing and his influence towards the defeat or miscarriage of justice.

On account of the complex nature of our present civilization, on account of the many new problems that have recently come up, the demand for the services of medical experts is on the increase. Judges are constantly forced to rely upon, and to be guided in their decisions by, the opinions and testimony of experts. Let them not impose upon the confidence placed in them.

Medical experts must understand that they have no material concern in the issues of the cause. They are not the advocates of this side or the other side of the cause. They are simply to give the value of certain facts as they appear.

The office of the medical expert is very important, and if he will do his duty he will win the respect of the bench and bar,—will raise himself to an exalted position in his own profession, and will gain a high place among those who render useful service to society.

Louis James Abernethy

Price Maintenance

BY HARRY S. GLEICK

Member of the St. Louis Bar

[Ed. Note.—The preceding part of this article appeared in the July Case and Comment.]

IN DISCUSSING the arguments for and against price standardization, before taking up the effects upon the three different classes interested, —manufacturers, dealers, and consumers,—it is instructive to consider the problem in a broader aspect, from the standpoint of economic distribution in general.[44] If the development of trade from the days of bartering to the present complex system of marketing and purchasing be traced, valid reasons present themselves, from the standpoint of distribution, in favor of uniform resale prices. "Primitive barter was a contest of wits, instead of an exchange of ascertained values. It was, indeed, an equation of two unknown quantities."[45] The adoption of money as a medium of exchange improved this situation somewhat. But before the one-price store was conceived of, the retailer and purchaser haggled over the price of each article, wasting the time of each; with this innovation a great advance in the process of distribution was made. It was still true, however, that the quality of the goods might vary. Even yet some stores sell the same grade of coffee at different prices. The advent of trade-marked articles and other goods particularly identified, advertised, and sold under the manufacturer's name or mark, meant the standardization of the quality of these particular goods. That is the very purpose of the identification, to put out a certain kind and quality of goods so that the purchasers, having used it once, will subsequently demand the same brand. There was still, however, a difference in the prices at which identified articles sold in different stores, even in the same locality.

The latest step was taken when the manufacturers of identified goods, by one method or another, set the retail price of the goods in order to advertise the selling price, protect themselves and the retailers against price cutting, and in general create an impression that the goods were worth what the majority of dealers were asking for them. The purpose of the identification is to familiarize the public with the particular brand and give it such a standing that it can be profitably advertised. To a great extent national advertising goes hand in hand with identified goods. The cost of distribution of such specialized commodities requires a large total of sales, and advertising is the only comparatively economical way to accomplish this result.[46] In the case of such an article national advertising and national distribution are badly hampered, and may be rendered impossible by the lack of a uniform resale price. The average dealer, whether a groceryman, clothier, hardware man, or druggist, is not anxious to handle an article that is subject to cut-throat competition. Therefore the point is made that price cutting of identified merchandise checks the national growth of business enterprise; that in present-day business the usual course is for manufacturers to declare what the uniform resale price shall be, and that to fly in the face of this custom will check, to an unnatur-

[44] No attempt has been made to distinguish between price maintenance by contract and price maintenance by notice; I have attempted to present the conflicting views as to the desirability of price maintenance, without regard to the way in which it is to be accomplished.

[45] Louis D. Brandeis, "Cutthroat Prices—The Competition that Kills," Harper's Weekly, Nov. 15, 1913.

[46] See G. H. Montague's "Should the Manufacturer Have the Right to Fix Selling Prices," 63 Annals Amer. Acad. 55.

al and abnormal extent, the legitimate development of industry.

There is something to be said, however, on the other side. The opponent of uniform prices objects, in the first place, to the appellation "price cutter." There is a distinction between the sort of price cutting employed by monopolistic enterprises with which we are all familiar, initiated for the purpose of eliminating a rival from the field, properly designated "predatory price cutting," and the selling of an article at a price lower than competitors, made possible by superior economies in merchandising, for the legitimate purpose of attracting customers. Moreover, the department store, the mail-order house, and the chain store is a natural development of modern industrial conditions; each of them has a particular place to fill and wants of the public to serve; and there is plenty of room for all of them and for the small dealer too, each within his own sphere. At the present time the costs of distribution are so great that, during the past few years, vigorous efforts have been made to discover methods of lowering them. The "middleman's profits have been an object of criticism and investigation, which emphasizes the fact that there is a real demand for the sort of enterprise that opposes uniform resale prices.

HARRY S. GLEICK.

Another point frequently pressed is that the law has always looked with abhorrence upon any arrangement to fix or maintain prices, which policy is reflected in the Sherman Act and in the various state laws copied after it.[47]

But it may be questioned whether this last argument is not fallacious. The anti-monopoly laws were passed to prevent price fixing of a very different nature from the maintaining of uniform resale prices. The Sherman Act and the state laws were never intended to apply to contracts made by a manufacturer with a jobber, which involved the determination of the price to the consumer. There is no connection between this latter situation and that which these statutes were intended to cover. This raises the question whether, from the standpoint of economic distribution, a restriction upon the resale price is actually monopolistic in tendency. A contract made in *general,* as distinguished from *partial,* restraint of trade, is said always to have been illegal at common law and unenforceable in equity; and since a restriction upon the resale price is a general restraint, affecting general public interests, it comes within the scope of the prohibition. Even if the restraint be only a partial one it must be held unreasonable, as it is not ancillary to the main object of the transaction.[48] Agreements fixing the prices of commodities have always been regarded as detrimental to the interests

[47] Report of the Special Committee on Maintenance of Resale Prices, United States Chamber of Commerce, April, 1916. See minority report, pp. 37–62.

[48] W. J. Shroder, "Price Restriction on the Resale of Chattels," 25 Harvard L. Rev. 59, 66, 67.

of the public, it is contended, and since these agreements restrain competition to some extent, at least, and tend towards monopoly, they are illegal.

But the monopoly problem and the question of price maintenance must be recognized as distinct, and entirely different.[49] The price fixed by the manufacturer, the advocate of uniform resale prices contends, is subject to the laws of competition, supply, and demand; while the only competition, in effect, under a régimé of price cutting is that of a producer competing with himself. What a monopoly does, is to sell cheap where there is competition; high, to the point of maximum net returns, where there is not; while under price standardization there would be uniform prices for each manufacturer's article, and the competition between these manufacturers, in which the manufacturers of unidentified merchandise could also enter, would result in a natural, rather than in a monopoly, price. The very use of trademarks and special brands is a sign of competition, as the purpose is to secure trade in a competitive market.[50] Advertising by monopolies to some extent is frequently deemed profitable, but where there is a special attempt to identify certain wares as the product of a certain man or organization, the reason almost invariably lies in the fact that the market is a competitive one. For instance, take a few of the businesses in which uniform resale prices have been maintained,—Gem and Gillette safety razors, Prophylactic toothbrushes, Kellogg's Corn Flakes, certain makes of shoes, hats, corsets, fountain pens; take the case of the Ford Motor Company, which has strenuously attempted to maintain a standard retail price,—in none of these cases can it be said that any tendency towards monopoly is apparent.

The proper test in the case of a restriction upon a vendee is that the limitation must not be wider than the protection of the vendor demands, nor so wide as to affect the public injuriously, and whatever is within this limitation was not invalid at common law nor prohibited by statute.[51] The term "general" when used in connection with restraint of trade does not mean "universal;" the criterion is the reasonableness or unreasonableness of the restraint; and protection to the covenantee is the test of reasonableness.[52] As a matter of fact, price cutting itself leads to monopoly by driving the smaller man out of business, as it has done in the case of the Standard Oil Company and the Tobacco Trust. Even more recently the United Cigar Stores and certain chain drug concerns in large eastern cities have succeeded in eliminating competitors by slashing prices, and there is plenty of evidence that large department stores have followed a similar practice.[53] We are familiar with the idea of "regulating competition," the purpose of which is to preserve, not to destroy.

The true competition among dealers handling identified goods produced by the same manufacturer should be, according to the standard price exponent, in service, which may be regarded as including location and a variety of incidental elements. The effect upon economic distribution of a given identified article by price cutting will be, first, that dealers will cut back and forth to the point where they will urge a substitute article upon the consumer; and, secondly, the manufacturer of the articles, being urged by the price-cutting dealers to lower prices to them, will be forced to reduce the quality of the article. Since we have reached a point where emphasis is upon quality, rather than price, either result is undesirable; and since a standard price

[49] F. W. Taussig, "Price-Maintenance," American Economic Review, Supplement, vol. 6, No. 1 (March 1916). While opposing price maintenance, Professor Taussig points out that the two problems are separate. Cf. the minority report of the committee of the U. S. Chamber of Commerce, referred to supra, p. 194, note 47, where an elaborate legal argument is made, all on the assumption that the one problem, if not identical with, is included in, the other.

[50] G. H. Montague, "Should the Manufacturer Have the Right to Fix Selling Prices," 63 Annals Amer. Acad. 55–57.

[51] See cases and authorities cited supra, p. 126, note 5; also Fowle v. Park, 131 U. S. 88, 97, 33 L. ed. 67, 74, 9 Sup. Ct. Rep. 658; Tode v. Gross, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L.R.A. 652; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

[52] 2 Pom. Eq. Jur. 3d. ed. § 934, pp. 1687, 1691, and notes.

[53] Infra, p. 198.

enables the manufacturer to keep up the quality, a recognition of the right to fix standard prices is in line with our economic development. In answer to the argument that identified goods are not necessarily of high quality, the proponent of price maintenance argues that this may be true, but it is just as desirable in that case that the purchaser know what sort of goods the identification stands for, and good or bad, with price cutting it will be worse.

It may be doubted, on the other hand, whether price maintenance actually keeps up the quality of the goods. The substitute article may be of just as good quality, and not infrequently is; at any rate, when the purchaser buys the identified goods, rather than the unidentified, he is not at all certain that he is getting a better article.[54] It may be, too, that price cutting, instead of causing a deterioration in the quality of the goods, furnishes a motive for increased efficiency among retailers, resulting in a lowering of overhead expenses.

Yet, if all contracts and other arrangements for the maintenance of uniform resale prices are undesirable, as is contended, let us assume for the time that retailers determined upon their resale prices solely upon their own initiative. It may well be argued that trade conditions would at once become uncertain, if not chaotic. Competition between dealers would be chiefly in price, and therefore prices would be continually fluctuating, especially upon well-known articles. Because of variations in prices resulting from an unstable market, a system of cost accounting would become almost useless for manufacturer or dealer. No dealer could carry an adequate stock of identified goods, for fear that he would not be able to meet his rival's price and still make a profit. The consumer would never know the purchasing power of his money. The result would be a return to the haggling between retailer and consumer over a large proportion of articles purchased, with the customer running from one store to another to find which was the cheapest. When each consumer deals with a number of stores of the same general class, there is also an economic loss in that larger sales forces are sometimes required, and if the stores make deliveries, the aggregate labor is greatly increased. Under such a system every dealer would have to meet his competitor's price, because if his price were higher he could not justify it, as he can with standard prices, upon the quality of the goods. Whatever saving of price that might accrue would be more than overcome by the indirect losses. After prices had been cut until the market for any product had been demoralized, dealers would not handle it, and there would be an economic loss to society.

But, in reply to this, it may be said that there are many patented and specially branded articles of which the manufacturer does not attempt to fix the resale price, yet there is no demoralization of the market for those commodities. The methods of distribution of unidentified goods, of identified goods of which there has been no standard price, and of identified goods upon which the uniform resale price has been maintained, have not been so very different after all. The maintenance of uniform prices, moreover, would eradicate the economies of distribution. Certainly it must be admitted that some firms are far more economical than others in the same line of business, and why should it be deemed unfair to other dealers if a more industrious competitor is content to make the same profit on an article that the other dealers make? With every dealer free to sell at his own price, experiments to reduce the cost of living are possible. The elimination of the middleman has been the cry of those who desire to lower the purchasing price of those articles in particular of which the cost of distribution is high; but under a system of price standardization no such savings could be made. The price would have to be high enough to guarantee both jobber and dealer a profit in all those industries in which jobbers play a part. No experimenting to reduce the high cost of living could be carried on, so far as iden-

[54] F. W. Taussig, "Price Maintenance," American Economic Review, Supplement, Vol. 6, No. 1 (March 1916); testimony of Percy S. Straus before the House Committee on Interstate Commerce, Jan. 6, 1917, not yet published.

tified goods are concerned.[55] The tremendous growth of mail-order houses and the place department stores occupy in the larger cities indicate that there is much to be said in their favor as part of our distributive system; yet they have not driven out, and will not eliminate, the small dealer, who seems somehow to thrive in spite of price cutting.

So much for the two sides of the problem as the general economic scheme is affected. When we turn to the effect of price cutting upon particular manufacturers, we find that those producing identified goods in general favor the maintenance of uniform resale prices. The manufacturer, in answer to the objection that, after he has sold his goods, received the purchase price and consideration, should not have the right to dictate the retail price, claims that he has a very real and vital interest in what that price is. He establishes a name and reputation for his article, advertises it widely, creates a demand for it, and by his efforts sells it, even though he has passed title. The manufacturer asserts that a good-will value, which is an important property right, is created by his own efforts. If the article is of poor quality, or for any other reason unsatisfactory to the purchasing public, the reflection is not, as in the case of unidentified goods, upon the dealer, but upon the manufacturer. The consumer does not cease dealing with that dealer; but he purchases a different brand of goods.

The manufacturer derives advantage from a uniform price to the public. Consumers are more inclined to purchase articles the price of which is widely advertised.[56] The price of the Ingersoll watch and the Uneeda biscuit are two well-known examples. The retail price of many standard articles has not advanced with the increase in the cost of production, the manufacturer believing it advantageous to maintain the price with which the public has become familiar.

From the manufacturer's standpoint an article to sell readily should be an article of quality well advertised and not only known, but known to be worth the price asked, it must be accessible to prospective customers, and sold readily, without the purchaser's doubting whether he is getting his money's worth.[57]

The result of price cutting by one dealer is to force other dealers to cut to the same price in order to maintain the trade on that article. One main purpose of the cutting is to attract customers. When cutting has once begun, buyers expect it to become general. Once a man has purchased Boston garters for 8 cents, he balks at paying 25, and a woman who has obtained Pebeco tooth paste at 29-cent sales hesitates to buy at the regular price. The consumer doubts if the regular price is justified, and will wait for a sale, or may try something else. The demand for the article at the regular price has diminished. Dealers are not quite so anxious to sell the article, and the chances are that other goods will be pushed upon which a profit is more certain. The small dealer will handle a dollar Ingersoll watch if it is being sold everywhere at that price, there being no incentive for customers in the neighborhood to go further; but if a large department store is selling for 83 cents or 73 cents possibly, it may no longer be profitable for him to deal in Ingersoll watches, to the injury of the manufacturer.

Thus, the manufacturer asserts that price standardization is no more than a reasonable method of protection.

The opposing contention is that the manufacturer is not so badly off as he would make one believe. The claim is made that no manufacturers have been driven out of business because of the cutting of prices in retail stores. The price on Pebeco tooth paste is cut regularly, but it not only remains upon the market, but is handled by dealers generally. Price maintenance would benefit only a small class of manufacturers, it is said; and these are the ones whose advertising ex-

[55] See Professor Taussig's article referred to, note 54, supra.

[56] See R. B. Callahan's pamphlet issued by the National Trade Association of New York, "Investigation Showing the Effect of Price Cutting on Trademarked Grocery Articles in Greater New York," June, 1916, pp. 10, 11.

[57] Testimony of Mr. Brandeis on H. R. 13,305, published in Hearings (Feb. 27, 1914, to Jan. 9, 1915), p. 11.

penses are enormous, and who want the public to foot the bill. Price cutting does not, as such, lead to destructive competition. It does not play an especially important part in the dealer's campaign for trade. The public demands high quality and efficient service, rather than low prices, and the trend of merchandising is to place the emphasis upon the former, rather than upon the latter. The dealer seeks the consumers' good will primarily, which is not obtainable by mere price cutting. Thus, price cutting is not a menace to the manufacturer after all.

In fact, lower prices tend to increase rather than to diminish sales. Then, again, the assumption that a cut in the retail price lowers the article in the eyes of the consumer is a gratuitous one; it is not true, as investigation proves, that the reducing of a standard price necessarily, or even probably, lowers the consumers' estimation of the article.[58]

When it comes to discussing the effect upon dealers, the opposing views do not clash so well. The exponent of price standardization is correct in declaring that the majority of dealers, including jobbers and middlemen of all sorts, are opposed to price cutting. Uniform resale prices afford them a measure of protection. One may say that a retailer should be permitted to run his own business in his own way, but if he is satisfied to abide by certain restrictions, with a view to protecting himself, why should anyone else complain that he is being deprived of his freedom? In a number of instances where manufacturers have asked retailers to vote on the question, the result has been an overwhelming vote in favor of a uniform price.[59] In answer to the objection that the manufacturer's price will be too high for the dealers, it is a sufficient answer to say that the one who would suffer from this would be the manufacturer, as the dealer would not handle the goods. The dealer points out that, with uniform prices, the selling process is simplified, planning in advance made easier, and a cost accounting system of value.

But the larger dealer objects to price standardization. Whatever the smaller dealers desire does not affect him, he asserts; he should be allowed to take advantage of his superior selling organization and economies of distribution. The dealer who sells for cash only should be entitled to offer a reduced price as to counterbalance the inconvenience to customers. The business of every dealer differs from that of every other; why should the more efficient be held back by the average? Surely the dealer should be allowed to determine his own margin of profit, is the argument. The right to sell one's own goods at one's own price is claimed as an inherent property right. Then, again, if uniform resale prices are to be observed, dealers in some commodities will have difficulty in disposing of their goods at the end of a season, and their assets being in a less liquid state, credit will be more difficult to obtain.

The answer made to these arguments is that, in the first place, it may be unfair for a large retailer because of his size to cut prices on a standard article. It is frankly termed dishonest advertising,—dishonest as to the manufacturers, because it takes advantage of the reputation the manufacturer has built up,—dishonest as to the small dealer, because the price is lower than the small dealer can meet, the price cutter recouping on other articles which the small dealer does not carry,—and dishonest to the consumer, because it induces him to believe that all other prices in the store are correspondingly low, whereas the consumer really makes up the loss in higher prices on other things.[60] The price cutter does not base his prices upon a lower cost of production at all. For instance, an advertisement of a large New York firm read: "When in a moment of desperation others cut to meet our prices, we in turn cut again and as often as necessary to sustain the R. N. Macy reputation for underselling supremacy." The same firm in another advertisement spoke of its "right to undersell every other store in the community."

It is strenuously denied that the cost of doing business with a large organization is even comparatively smaller than

[58] R. B. Callahan's pamphlet, pp. 12, 13.
[59] Charles L. Miller, "The Maintenance of Uniform Resale Prices," University of Pennsylvania Law Review, November, 1914.

in the case of a small one, with the larger store drawing its trade from greater distances and having comparatively greater overhead expenses.[61] The only saving is in being able to purchase from manufacturers cheaper by eliminating the jobber. The department store survives cutthroat competition because of its size; having large resources, it can afford to lose money on an article for a while, ultimately recouping. The dealer who alleges that he can sell lower because of economies of distribution should take advantage of this superiority in some other way than by slaughtering prices upon established brands of merchandise. As to the "right to sell one's own goods at one's own price," it may be said no such right exists where the goods are obtained under a limitation that they are to be resold at the vendor's price. And the fact that the manufacturer may refuse altogether to sell his goods to a dealer includes the right to refuse to sell unless certain conditions are complied with, and, having taken under such conditions, the dealer should be bound by them.

The department store and mail-order house, drawing its trade from a distance, contends that it should be permitted to offer an inducement to overcome this disadvantage. Price cutting after all is not usually deceitful; it is merely a form of advertising. There is nothing malicious about the transaction. The big stores save by eliminating the middleman, quite a desirable thing. The small man is not driven out of business; the larger store amply fills a hitherto unsatisfied demand. The goods purchased by the dealer belong to him; why should other people tell him upon what goods he should be permitted to cut prices, and upon what he should not?

A consideration of the question from the consumer's point of view is not so simple. At first blush it would seem that when the price is lowered on goods which the consumer wants, the consumer derives the benefit of the lower price. So the price cutter argues. The consumer would get the benefit of reductions made for the purpose of advertising and stimulating trade, or for reducing stock. For the vast majority of consumers these little reductions are a distinct saving. In case of price maintenance, the government will sanction a static condition by which the consumer must always pay the price fixed by the manufacturer, which may be a high price, much more than the article is worth, even conceding that the approval given to uniform resale prices does not extend to monopolistic enterprises. Advertising costs may be tremendous, and the consumer must bear the burden. The consumer is interested in seeing the profits of the middleman cut down; that is why department stores, mail-order houses, and chain stores do such a thriving business. In the case of certain patented articles, for instance, where the manufacturer has been able to set the resale price, the tendency of prices has been upwards, and not downwards. The argument is made that the consumer is not interested in the wishes of the manufacturer, except in so far as he is benefited or prejudiced by them; his right is to purchase at the lowest price that the dealer can make.

Whereupon the standard-price advocate argues that in the long run there is no saving to the consumer, even on the articles offered for sale at reduced prices. In the first place, when price cutting makes it unprofitable for dealers to handle a deserving brand of goods, the consumer is thereby injured; his opportunities to secure this article quickly and easily are lessened. And, again, in so far as price cutting tends in the long run to weaken the quality of the article, the manufacturer being forced to make lower prices to the dealers, the consumer feels this loss. Moreover, where there is price cutting on an article the dealers as far as possible substitute other articles, or the consumer is forced to take other articles because the dealer shuns the identified article, the purchasing public is that much worse off. Price cutting which makes it unprofitable for a great

[60] Only the situation of the dealer is discussed here.

[61] Testimony of Dr. Paul H. Nystrom before the House Committee on Interstate Commerce, on H. R. 13,568 (May 30 and June 1, 1916), pp. 24–26; testimony of Mr. Brandeis before the same committee, on H. R. 13,305 (Feb. 27, 1914 to Jan. 9, 1915), pp. 41–43.

many dealers to handle a line of goods, thus checking its national distribution, will cause such a decrease in the total sales as to make it necessary for the manufacturer to raise prices to recoup the loss thus sustained. Uniform resale prices are not extortionate; they are subject to the laws of competition. And, after all, the consumer is not the one who pays for the advertising. The manufacturer of an extensively advertised article is able to secure a better price from the dealer than the manufacturer whose goods are not widely known.

The price cutter, it is further claimed, does not philosophically pocket the loss sustained by reducing the price on standard goods. He makes it up on something else. There are among bargain-hunting women a certain class known to the trade as "sharp-shooters," women who can read through a long advertisement, pick out the "leaders," the real bargains, purchase them, and nothing else. But the vast majority are not so clever; they purchase other articles besides, upon which the dealer recoups his losses. And frequently at these sales purchasers stock up on a lot of apparently cheap goods which they have no real use for. To this extent stimulation of trade in this way is to be avoided.

The buying process of the consumer is simplified when standard prices are maintained, as he goes to the most convenient store and obtains the standard one-priced article without any unnecessary loss of time or energy.

A further point is urged that, if price cutting upon identified goods is permitted, the reputation and good will of the manufacturer not being protected, the incentive to produce new and improved wares, from which the producer will not be assured a profit, will be withdrawn. Together with these considerations, it must be remembered that if the small dealer is driven out the consumer loses the advantages of independent merchandizing, and will have to be content with retailing monopolized by large stores.

The answer to these arguments is that the consumer is not as gullible as some people think. The modern consumer knows more than ever before about the quality of the brands he (or she) buys, and if a department store has "fake" sales, one or two "leaders," and the rest goods upon which the public is to be fooled, the purchasing public finds it out so easily that such practices could not be followed by a first-class retailer. All arguments as to the ultimate loss by the consumer because price cutting discourages the distribution of standard goods, and the evil effects thereof upon the consumer, assume the very point in issue. It must first be proved that as a matter of actual fact price reduction upon standard articles does have an injurious effect upon other dealers and upon manufacturers. The way the thing works out in practice does not support the theoretical conclusions reached by the uniform price supporters.

These are not by any means all the arguments that have been made, on the one side or the other, of the question of price standardization. But these seem to be the main ones upon which the proponents and the opponents of the measure now before Congress base their hopes.

IV.

The bill before Congress at the present time [62] is known as the Stephens-Ashurst Price Maintenance Bill, which was preceded by the Stevens,[63] or Stevens-Ayres Bill. The Stephens-Ashurst Bill [64] is in certain important respects different from the Stevens Bill.

The Stephens-Ashurst Bill provides, in § 1, that "in any contract for the sale of articles of commerce to any dealer, wholesale or retail, by any grower, producer, manufacturer, or owner thereof, under trademark or special brand, hereinafter referred to as the 'vendor,' it shall be lawful for such vendor, whenever the contract constitutes a transaction of commerce among the several states, or with

[62] January, 1917.

[63] H. R. 13,305, 63d Cong.

[64] H. R. 13,568, § 5064, 64th Cong. The Borah Bill, along the same lines, § 5991, sixty-fourth Congress, is similar to the Stevens Bill, except that it would give to the Federal Trade Commission wide power in investigating and fixing resale prices. The bill does not appear to have been pushed very aggressively.

foreign nations, or in any territory of the United States, . . . to prescribe the uniform prices and manners of settlement at which the different qualities and quantities of each article covered by such contract may be resold." The bill thus far simply seeks to recognize as lawful contracts providing for the resale price.

By proviso (a) the bill excludes from its terms any vendor who has a "monopoly or control of the market," or who is a party to a combination to control the market for articles of the same general class as are covered by the contract.

Proviso (b) relates to the filing at the office of the Federal Trade Commission "a schedule setting forth the uniform price of sale,—to dealers at wholesale and the uniform price of sale thereof to dealers at retail, from whatever source acquired, and the uniform price of sale thereof to the public." The prices set forth in the schedule and in any contract are to be "uniform to all dealers in like circumstances, differing only as to grade, quality, or quantity of such articles sold, the point of delivery and the manner of settlement, all of which differences shall be set forth in such schedule; and there shall be no discrimination in favor of any vendee by the allowance of a discount, rebate, or commission for any cause or by grant of any special concession or by any other device whatsoever."

The Stevens Bill proviso (c) was different in that it provided that the schedule should be filed in the Bureau of Corporations; and it further provided that under no circumstances should there be a discount for any cause.

The next proviso (c) of the present bill permits such contracts to provide for disposal sales, at appropriate times, provided that the articles shall have first been offered to the vendor at the price paid for them by the dealer, and "that such vendor not less than thirty days prior to the date set forth for the next disposal sale, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer." The Stevens Bill failed to make provision for disposal sales.

The last proviso of § 1 makes special provision for sales in case the dealer is ceasing to deal in the article, or in case of bankruptcy; and, irrespective of contract provisions for disposal sales, if the articles become damaged, deteriorated, or soiled, the dealer may sell at reduced prices, if, after a reasonable opportunity for inspection has been given to the vendor, the latter refuses to accept them back at the price paid by the dealer.

Section 2 excludes from the application of the act sales to the United States, to public libraries, and to an enumerated variety of religious and educational institutions. This section is also an addition to the provisions of the Stevens Bill.

The latter bill, however, contained one proviso omitted from the Stephens-Ashurst Bill, declaring that the vendor "shall affix a notice to each article of commerce or to each carton, . . . stating the price prescribed by the vendor at the time of the delivery of said article as the uniform price of sale of such article to the public, . . . such article . . . shall not be resold except with such notice affixed thereto or to the cartons. . . ."

The first objection the opponents of the bill make is that it would create chaos by establishing a special rule for interstate commerce. To which the supporters of the legislation retort that the bill simply states the rule recognized by all the states where the question has arisen, and in those in which there has been legislation on the subject. It is then urged that in case the Stephens-Ashurst Bill becomes a law our entire mercantile system would have to be readjusted. The answer made to this is that since our modern economic system has grown up under the impression that price maintenance was possible, and it is only recently that there was any doubt cast upon this, there will be no readjustment necessary unless the bill fails to pass.

A more tenable objection to the bill is that in practice it will be very difficult to tell which businesses are monopolies, and which are not. When a certain concern attempts to file its schedule of prices, there is nothing to prevent it from doing so unless it can be shown that it has some control of the market for the article in question. It will not be so easy to determine this fact, and the result will be that the government will be putting

its stamp of approval upon contracts made by organizations which substantially restrain trade. Then, again, any bill along these lines is alleged to be defective unless the public is adequately protected against schedules of high prices. To this it may be said that as far as goods subject to competition are concerned, economic conditions will fix the price; otherwise, the problem is to guard against monopolies.

The objection has been made that the bill is paternalistic in its theory, and that it is not well to trammel business unduly. On the other hand, it is urged that the object of the legislation is to remove the shackles which the present interpretation of the law has placed upon business, and that in effect it will give manufacturers and dealers more freedom in entering into business relations with each other than is at present allowed them.

Whether or not the bill eliminates discrimination by the manufacturer for the benefit of favored dealers is a disputed question. The exponents of the legislation point out that the prices shall be uniform to all dealers in like circumstances; on the other hand, it may be said that in interpreting "in like circumstances" is possible for a favoritism to find a place. It is further urged that the provision permitting contracts for seasonal disposal sales is broad enough to allow favored dealers great advantages.

To which it is answered that it is so much to the manufacturer's interests to treat all dealers fairly and alike, that they would shun favoritism, and that in the past there has been but negligible discrimination on the part of manufacturers in aid of particular dealers.

That the dealers are too greatly restricted is another count urged against the Stephens-Ashurst Bill. Emergency sales are impossible, as, in the absence of contract for seasonal disposal sales, the dealer must show that the goods are damaged or deteriorated, and then a reasonable time must be allowed for inspection. In the case of fruits sold under a special brand, as some fruits are now, and which the bill is broad enough to cover, immediate sales might be a matter of necessity.

But the bill is not mandatory. In those industries where emergency sales are necessary, manufacturers would not file schedules of resale prices, knowing that dealers would not handle their goods if they were so bound. Ordinarily sales are planned so far in advance that there would be no difficulty, even under the thirty-day clause in the case of seasonal disposal sales, in affording due time for inspection without inconvenience to dealer or manufacturer.

It may also be noted that while the bill provides for discounts to dealers based upon grade, quality, or quantity, the point of delivery, and the manner of settlement, there is no provision for similar discounts to consumers for the same causes. The defense for this is that if there are economies in this respect the dealer has plenty of other ways open to him to give the consumer the advantage of them, and discriminations against small consumers of staple products are undesirable.

Objections to the bill have been made upon the ground that it is unconstitutional. Unfortunately the reasons given have been vague and unsatisfactory. It would certainly seem that Congress, under the commerce clause of the Constitution, has discretionary power to enact such a law as the Stephens-Ashurst Bill proposes, which is discretionary, not mandatory.[65]

To one who has read the opinions of the courts in cases relating to the resale of identified goods at standard prices, and has followed the discussion of the Stephens-Ashurst Bill, it must be apparent that some legislation is desirable. It has been intimated, it is true, that perhaps, at the present time at least, the problem is not of great importance, and that it would be well to leave matters as they are. But to do that leaves unsettled the question as to whether or not contracts which are being made from day to day are not only illegal and void, but even criminal. The state of the law is so unsatisfactory to the great majority of manufacturers and dealers that Congress should make a determined effort to clarify it.

Any legislation should recognize the

[65] Cf. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

right of the manufacturer to refuse to sell, and that this refusal need not be based upon reasonable grounds. To deny this right will lead to insuperable difficulties and intense dissatisfaction.

It must also be recognized as a matter of plain fact that, even in the absence of contract or restriction, a great many manufacturers rely upon the word of the retailer to sell at a certain resale price, and that retailers do respect these promises. The mere indication by the manufacturer that his product retails at a certain price is sufficient in many cases to standardize the resale price, and any interference with this custom will invite trouble, being in conflict with accepted methods of merchandizing.

If the principle of price maintenance is to be adopted, the Stephens-Ashurst Bill is an excellent measure for enacting that purpose into law. However, there should be eliminated from the bill certain weak points which, while they do not constitute serious drawbacks to its adoption, assuming that some legislation favoring price standardization is to be passed, yet weaken the value of the measure.

A far more adequate provision is necessary to guard against enterprises which substantially control the market, either individually or in combination, coming in under the provisions of the act. The Stephens-Ashurst Bill states that vendors who possess a monopoly are excluded from the provisions, but it will require more than this statement and anti-trust laws as they now exist and are now administered to prevent businesses with a substantial control of the market from filing schedules of prices.

An objection to the bill as it now stands is its ambiguity upon the question as to whether it is to legalize contracts only, or is to go further, and sanction restrictions and conditions by way of notice, which shall be valid against any dealers purchasing with knowledge of them. The bill apparently purports to go no further than to legalize contracts, and the testimony before the committee supports this view.[66] Another important circumstance supporting this view is the fact that the section of the Stevens Bill providing for the affixing of a notice to each article containing the price prescribed by the vendor has been omitted from the present bill. The intention of the framers of the latter certainly is that it shall legalize contracts only. Yet in proviso (b) of § 1 of the bill as it now stands, it is provided that the vendor shall file a schedule setting forth "the uniform price of sale (of the articles) . . . to dealers at retail, *from whatever source acquired*, and the uniform price of sale thereof to the public." This might possibly indicate that the prices fixed in the schedule should be adhered to, even though the dealer is not a party to the contract with the manufacturer.[67]

Practically all of the arguments that apply in the case of retailers selling under contracts apply to the case of those selling with mere notice. In event of the passage of a bill providing for the legalizing of limitations by contract only manufacturers who sell through jobbers would contract with the latter that the jobbers should resell only to dealers who contracted to maintain the manufacturers' standard price. If the dealer must be a contracting party to be bound, it may be that price cutting to some extent upon identified goods will continue, as dealers by devious means can obtain the goods from jobbers or other retailers. On the other hand, there would probably be a tendency on the part of manufacturers to sell to those middlemen only who sell immediately to the public, and thus the jobbers' profits in those cases would be eliminated. Whichever theory is to be adopted should be clearly shown in the bill itself; it should not be necessary for the courts to search for the purpose of legislation.

What the fate of the bill will be it is difficult to predict, but because of the tremendous influence it would have upon our system of merchandizing the greatest care should be taken to prevent a stultifying of its purpose by an abuse of its provisions.

Harry S. Gleiss

[66] See Mr. Brandeis's testimony on H. R. 13,305, pp. 50, 51, 54.

[67] See note 15, 30 Harvard L. Rev. p. 70.

*Latin and the Law**

BY JULIAN P. ALEXANDER

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CONSIDERATION of the value of Latin training for the lawyer necessarily involves an investigation of the part this language has played in the development of our modern legal system, and as to what extent our present systems are indebted to this medium of expression.

The legal systems of all civilized nations come either from the civil or Roman law (*jus civile Romanorum*) or from the common law of England. In this country it is the rule that the common law is adopted as the unwritten law of the several states. The civil law now refers more particularly to the compilation of the then-existing rules and laws in the 6th century under Justinian. As new cases arose, embodying principles formerly considered by the courts, it became customary for a judge to examine the records to see what disposition was made in the similar case, not only that it might serve as a guide to him, but also that the interpretation and application of the laws might be uniform. This custom therefore became an established principle in the decision of causes, and is preserved to us in the original expression, *stare decisis*. Inasmuch as the language of the Romans lent itself so adaptably to the exact expression of fundamental principles, it became the common medium by which these principles should be transmitted to succeeding generations.

In the meantime, however, there was developing in England a sort of law French which threatened to supplant the mother tongue as the language of the courts. As a logical consequence of the successful conquest of William the Conqueror in the 11th century, the invaders sought to remove every usage and custom that appeared inconsistent with a complete domination. The English, ever slow to tamper with customs, nevertheless gradually came to accept Norman-French as the language of Parliament and of the courts; and with the same aversion to change were slow to relinquish this usage. To this day legal vocabularies abound in phrases from the French. The common law actions of "detinue" and "trover," as well as of "garnishment," are examples of this influence. The action of "trover" is really an action to recover the value of personal property converted, but was originally an action of trespass for damages against a party for the recovery of certain goods and chattels, which, by a quaint legal fiction, he was charged with having found (*trouver*). Schoolmasters, in obedience to the enforced custom, required their pupils to construe from Latin into French instead of the English. The Parliamentary acts and edicts went from the House of Commons up to the House of Lords indorsed, *"Soit baile aux Seigneurs,"* and were returned, *"Soit baile aux Communes."* The leather-lunged crier of the humblest hamlet never emerged from the stupor that was his official prerogative and proclaimed "loss of a yeoman's sporting dog, the auction of a bankrupt dealer's stock in trade, or the impounding of a strayed cow until he had commanded in broken Norman-French the attention of the sleepy rustics."

As early as the 13th century, schools for the study of law existed in London. The law, being recognized as a learned calling, legal societies and academies sprang up for the perpetuation of that learning which they recognized as essen-

* From Address before Mississippi State Teachers' Association.

tial. It is needless to state that this training demanded a thorough familiarity with the Latin language. So important was this training regarded that when these societies and schools were suppressed by a mandate in the 19th year of Henry III.'s reign, faithful scholars still persisted in individual study and training. So that later, when Edward I. ordered his judges of common pleas "to provide and ordain from every county certain attorneys (*attornatus*) and lawyers of the best and most apt for their learning and skill, who might do service to his court and people," and further provided that those, and only those, so chosen should follow his court and transact affairs therein, these students were ready to assume the prominence that their study had justified.

Then arose the inevitable conflict between the English and the French as the language of the courts, and the Latin gained an additional foothold as a common medium of legal expression. From the time of the Norman Conquest until the last half of the 14th century, pleadings in courts of justice were required to be in Norman-French. Later, it was ordered by statute (36 Edw. III.) that debates, defenses, and arguments should be made in English, but decrees and judgments enrolled by the clerks in Latin. The descendants of the invaders, ever jealous of the loss of any semblance of influence, met this mandate with an organized resistance which gradually evolved a sort of French-Latin jargon, thus threatening to rob the Latin of some of the purity and certainty of its expression. But the Latin was again recalled to the records by Charles II., only to be finally abolished by the statute of George II. (4 Geo. II. chap. 26). This last royal interference was strenuously opposed by Lord Raymond, William Blackstone, and others, Blackstone openly declaring that such a change had a "tendency to make lawyers illiterate." To the explanation that Latin as a language was not understood by all, Blackstone reminded them that there were many Welchmen who could not understand English and were yet placed upon the juries of the court. One interesting story is told, illustrating the difficulty of adjusting the court language to the intelligence of the juries and claimants, and the necessity for a fixed common court language. A wife murderer faced a determined court, a jury box filled with honest Welsh freeholders, and, in his vision, the outlines of the gallows. Able prosecutors, obedient to Parliament's fixed fiat that pleadings and arguments be rendered in English, waxed as eloquent as that medium permitted. The stolid Welshmen were entertained, but not enlightened. The counsel, observing a significant lack of sympathy and only a mild curiosity wholly incommensurate with their expenditure of oratory and gesticulation, requested the judge to instruct the jury in their own tongue. But that worthy, faithful to Parliament's orders, delivered his charge in the English tongue. The jury, awed and impressed, retired to consider their verdict, filled with more than a reasonable doubt as to the prisoner's guilt and an absorbing curiosity as to what it was all about. In a remarkably short time, the prisoner was surprised with a verdict of "not guilty," "greatly to the encouragement of many wretched Welsh husbands anxious to have an end of their matrimonial sufferings."

But so much for the history of the evolution of the Latin language as the monument on which our legal maxims and axioms, as well as much of our legal history, are engraved. We might have gone so far as to have disregarded the explanation of the existence of Latin in our legal texts and accept the plain fact that it is there. But its presence is the result of the same considerations and necessities that have preserved it through so many adversities down to the present time.

So then, the advantages of a training in Latin might be said to be those that attend the study of history, as well as of etymology, and so the student of law encounters on every hand phrases and principles carved in Latin and transmitted to him and his age in their original vigor and shades of meaning. Many, he finds, have become so familiar that he adopts them as "naturalized." Actions of assumpsit, quo warranto, and upon a *quantum meruit* or *quantum vale-*

bat, writs of capias and subpœna, pleadings of *nol. pros.* and *pro confesso,* are so familiar that he often loses sight of their original significance. Yet the student must draw upon his knowledge of the Latin to assure himself that he knows the distinction between a "summons" and a "subpœna," a capias, a warrant, and a mittimus, between a habeas corpus ad testificandum and a habeas corpus ad satisfaciendum, between scire facias, venire facias, and fieri facias, and administrators *de bonis non, cum testamento annexo,* and *de son tort.* Is the layman correct when he speaks of "subordination" of perjury? To the Latin students the value and importance of *"obiter dicta"* in applying the doctrine of *stare decisis* are amply explained within the phrases themselves.

It is interesting to observe that the most common expressions are but "nicknames" of once formal writs and royal commands, the exact nature of which expressions is still suggested by the term used. The mandamus is but the beginning of a judicial command whereby "we command" the performance of duty; the "capias" is but the thing commanded in a formal writ directed to a sheriff, commanding "that you take" the prisoner, and the *mittimus* but the announcement that "we send" the body of the prisoner to the jailer of the county or other official for custody. All these writs and orders, of course, need to be referred to in the original when the construction of their terms is pertinent. For example, the summons is not *sub pœna,* for the defendant summoned is not called "under penalty," save that which he might impose upon himself by his failure to present his defense, yet the subpœna subjects a witness who is called to the penalty of the court for failure to appear and testify.

Countless citations of expressions now almost Anglicized could cumber this discussion, but it may be sufficient to suggest that even from the standpoint of etymology a knowledge of their origin and significance is more than helpful, it is necessary. Two further illustrations might serve: The young lawyer drawing his first deed, or acknowledging his first affidavit, encounters in his guiding model the ever mysterious "ss.," whether it be the "State of Mississippi, County of Hinds," or the "United States of America, State of Oregon," there is the little "double s," relic of some ancient custom or form, too old to investigate, yet too revered to be disregarded. The Latin student catches the suggestion, and his investigations reveal an abbreviation of the inoffensive adverb *scilicet,* reminder of the days when the legal scribes wrote documents in the name of the realm, with the provincial subdivisions always prefaced by "namely" or "to wit."

A criminal breaks jail and flees abroad. The sheriff immediately organizes a band of persons which the newspaper reporter, ever watchful of his opportunities, takes delight in characterizing as a "posse." It is not only his right, but it is right, and being a term of restricted application and of rare propriety, we cannot deny to him the pleasure and privilege of thus denominating this band of persons; for does the journalist not refer in pride and abbreviation to the ancient *"posse comitatus,"* that "power of the county" (which the sheriff represents) to conscript those otherwise inoffensive citizens of the county whose assistance the emergency demands? That ominous, unorganized gathering of outraged citizenry that would snatch the captured prisoner from the sheriff's hands might be a mob, mass, horde, host, gang, or throng; that uniformed, orderly, bodyguard that would protect him in the exercise of his authority might be a coterie, cordon, company, crowd, band, or body. But that motley, resolute, heavily and variously armed handful of conscripted man hunters is nothing, can be nothing, but a "posse." Thus characterized, the armed and untrained company enter the woods and fields of their neighbors, their depredations and trespass justified and explained by this simple but proper designation.

It may be that the student learns his Latin in the study of law. If this fact does not demand that he come thus already prepared to the study of law, it at least suggests the advantage of doing so. As suggested, if the student is not prepared in Latin, he must to some extent become acquainted with its expres-

sions, regardless of his views as to its necessity. If the use of Latin terminology, for example, is cumbersome for the botanist or the pharmacist, the best answer is that its presence in those sciences is undeniable. The laymen is often shocked at the pronunciation of legal Latin by the practitioner, and is apt to construe a tolerated tendency as a lack of training. The young barrister learns the legal maxim, "Equity looks to the intent rather than to the form." Thus reassured, he stands boldly before the bar of justice and thus quotes an ancient definition of liberty, "Libitass est potestass fassiendy id quodd jury lissyat," thus not only imparting the knowledge that libery is the power of doing what is permitted by law, but giving a practical demonstration of some of the liberties which the law permits. "Kwy fessit prallium fessit p'see," argues the learned counsel upon the doctrine of agency and his confrères, by a gift that comes with practice, understand what he means, for he has come, through many pronunciations, at last to reincarnate the so-called dead language, and, by domesticating it, to call it his own. It is not a choice, but an evolution, and he indorses the practice only in the sense of the legal principle that one permits what one sanctions.

In conclusion, I might call attention to the very general demand that candidates for admission to the bar possess higher educational qualifications than formerly. Most of our states require a degree of advancement in literary lines that usually means a study of Latin; a recent poll of leaders of the bar throughout the nation on this subject disclosed a practically unanimous sanction of the suggestion to further raise the educational requirements. Many learned men urged even the prerequisite of a full four-year collegiate course. This should not come as a surprise, inasmuch as the law, while not always an exact science, is at least an exacting one. The successful practice of law summons all the talents and abilities of the practitioner; hence the question as to the value of Latin in legal training might well be answered in the same way as the question of the value of this training in education generally. For, after all, what is education but the preliminary fitting of one to serve his fellow man to the best of his ability in the vocation of his choice?

A Great Gulf

He carefully marked it, "Precipice,"
Opposing counsel said, "What's this?
Go take a jump off the great abyss,
It's 'Præcipe,' not 'Precipice.'"

Malta, Montana. From Fred C. Gabriel.

Failure to Support as an Independent Ground for Divorce

BY WM. C. DUNBAR

of the Boise (Idaho) Bar

IT IS interesting to compare the statutes of the different states, and the conceptions of those who framed them, as to the duty of the husband to maintain his wife and as to her right to obtain a divorce in the event of his failure to do so. Such a comparison will also show, in one of its aspects, the growth of the thought that married women are entitled to just treatment before the law.

The legislatures in twenty-three states have passed statutes which make the failure on the part of the husband to provide for his wife, when he has the ability so to do, the basis of an action for absolute divorce in favor of the wife. In almost all of these states, the statutes expressly enumerate as one of the grounds for divorce the husband's neglect in this regard, but in three of them the wife may be granted relief under the provisions of statutes making "gross neglect of duty" a ground for divorce. These laws vary in respect to the degree or nature of the neglect required, and the time during which it must have continued to give rise to a cause of action.

It is not the purpose of these statutes to impose on the husband the performance of a duty which is impossible or unreasonable, and it is therefore always necessary for the wife to show that in fact her husband had the ability to provide for her. If, for instance, it appears that he has been unable to support her because of his imprisonment or insanity, the decisions clearly hold that the wife will have no ground for divorce.[1] Moreover, the courts will not inquire into the reasons which have led to these conditions. It is enough that during the time complained of the husband had not the ability to perform this natural duty. Thus, in Hammond v. Hammond, supra, where the husband's neglect was due to the fact that he had been imprisoned for burglary, and possessed no property whatever, the court dismissed the wife's petition, saying:

> We cannot hold that respondent had sufficient ability, when it is clear that he did not have it merely because he lost it by his own fault. The fact that the fault was also a crime makes no difference, in legal point of view; for it is not the crime which the statute makes a cause of divorce, but neglect or refusal to provide, being of sufficient ability.

It has been held that "ability" or "pecuniary ability," even where the words "pecuniary ability" were defined by the statute to mean "sufficient ability to provide suitable maintenance for a wife, whether derived from the income of property, personal labor, or any other source," refers only to money or property which the husband actually possesses, and not to that which he might have if he were inclined to work or to use the physical or mental power which he has to acquire money.[2]

In Farnsworth v. Farnsworth, supra, in denying the wife a divorce, the court said:

> The record, when carefully considered, shows that the husband was a lazy, shiftless fellow, and probably had physical ability and capacity, if he had properly applied himself, to earn wages sufficient to provide suitable maintenance for his wife, but it does not show that the avails of his labor, actually performed dur-

[1] Hammond v. Hammond, 15 R. I. 40, 2 Am. St. Rep. 867, 23 Atl. 143; Baker v. Baker, 82 Ind. 146.

[2] Farnsworth v. Farnsworth, 58 Vt. 555, 5 Atl. 401; Jewett v. Jewett, 61 Vt. 370, 17 Atl. 734; Cilley v. Cilley, 61 Vt. 548, 18 Atl. 1120; F— v. F—, 1 N. H. 198 (cited with approval in Washburn v. Washburn, 9 Cal. 475).

ing the period complained of, were sufficient to have enabled him to provide proper maintenance for her, nor does it show that he had other money or property which he could have used for furnishing such necessary support.

It is evident that the practical effect of such a law, so interpreted, would be that a man possessing capacity to earn a suitable living for his wife and children could waste his time in idleness and dissipation while they lacked the common necessaries of life, and yet his wife would not be entitled to relief by divorce. However, the statute in Vermont has since been changed so that the wording now is "sufficient pecuniary or physical ability," instead of "sufficient pecuniary ability."[3]

In other states, the legislatures and courts have recognized that a man should have no more legal or moral right to neglect to use his earning capacity for the support of his wife, when necessary, than he has to refuse to supply her needs from the property which he actually possesses.[4]

In California, North Dakota, South Dakota, Montana, Arizona, and Idaho, where the statutes on this subject are the same, and where the wife is entitled to a divorce for wilful neglect on the part of the husband, which has continued for a year, wilful neglect is defined as "the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so, *or* it is the failure to do so by reason of idleness, profligacy, or dissipation." It will be seen that this provision states two distinct kinds or classes of neglect, and a complaint charging wilful neglect under such a statute should specify the particular facts on which plaintiff bases her action.

In Devoe v. Devoe, 51 Cal. 544, where the allegation was that "by reason of profligacy and dissipation he has failed to provide for her the common necessaries of life," and the finding of the lower court was that defendant was guilty of wilful neglect "by failing to provide for the plaintiff the common necessaries of life, he having the ability so to do," the judgment was reversed on the ground that this finding of the lower court was outside the issue.

Where the husband is doing the best he can, but has not the means and is incapable of earning enough to provide for his wife, she is not entitled to a divorce because of his failure to support her.[5]

In Carson v. Carson the court said:

> Neither misfortune nor incompetency resulting in a failure to support affords the wife any ground for relief under the law. The possibility of such a result was one of the hazards complainant undertook when she assumed the burdens incident to the contract.

In Gallemore v. Gallemore, where the wife of a young physician sought a divorce, the interesting question was raised as to whether the husband should have taken his wife's advice to secure other employment when it was found that the income from his chosen profession was not sufficient to provide for her. But it was held that the defendant could not be required to do so. "Indeed," said the court, "the law will not be so harsh and severe as to require a professional man to abandon his profession for no other reason than that his business comes slowly, and betake himself to some other calling, under penalty of being declared a vagrant for failing to make a living (which is a ground for divorce in Missouri), when he is doing the best he can in that behalf." However, the particular circumstances of each case will be considered, as it is easy to see that a husband might seek to carry such protection to an extreme, and in the case of Bell v. Bell, 15 Idaho, 7, 96 Pac. 196, where the question was whether the defendant had deserted her husband, a mining expert, and defendant claimed she had left him because he had failed to furnish her with a suitable home and support, the court said:

> A mining expert without a job and without money, and with a wife and son to support, is not justified in refusing to work at anything except his chosen business and thus compel his wife to support herself and child.

[3] Public Statutes of Vermont, 1906, § 3068.

[4] Taylor v. Taylor, 20 N. M. 13, 145 Pac. 1075.

[5] Gallemore v. Gallemore, 115 Mo. App. 179, 91 S. W. 406; Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271, 51 L.R.A.(N.S.) 460; Stewart v. Stewart, 155 Mich. 421, 119 N. W. 444; Carson v. Carson, 173 Mich. 452, 138 N. W. 1076, 43 L.R.A.(N.S.) 255.

In a number of states, something more than what is called "mere neglect" or "simple neglect" on the part of the husband is required before the wife is entitled to a divorce, and the statute of Massachusetts may be taken as an example. It provides that a divorce from the bonds of matrimony may be decreed on the libel of the wife "if the husband, being of sufficient ability, grossly or wantonly and cruelly, refuses or neglects to provide suitable maintenance for her."[6] The words "grossly or wantonly and cruelly" are also found in this connection in the statutes of Maine, Vermont, Michigan, and Nebraska. In construing these statutes, the courts have insisted that these words have a meaning which cannot be ignored, and that the mere neglect or refusal by the husband to provide his wife with necessaries, however long continued, will not necessarily mean that the husband has grossly or wantonly and cruelly failed to provide. To illustrate, in Peabody v. Peabody, 104 Mass. 195, where the court found that the wife had supported herself and children for fifteen years; that neither she nor her children had ever suffered, or been in danger of suffering, for want of support, but that they might have suffered if she had not supported them by her own earnings; and that, since her husband left her, she had never asked him for support, but relied on her own earnings,—it was held this was a case of "simple neglect, with no circumstances of aggravation."

It must be confessed that, however such a decision may be justified by the wording of the statute, it is, nevertheless, rather shocking to one who is familiar with the more advanced thought and statutes on this subject, to learn that for a husband and father, without any lawful excuse, to neglect to provide the necessaries of life for his wife and children for a long period of years, is "simple neglect, with no circumstances of aggravation."

In a Vermont case, however, it was held that where a man without property married the petitioner, who had a large amount of it, and later sold and received the money for all his wife's personal property, of the value of $1,500, and permanently leased her real estate, and mortgaged the rent for a number of years, to pay his own debts, and then deserted her without making any provision whatever for her support, and refused to do so, and these conditions had continued for months, a divorce should be granted under a statute giving the wife relief where her husband had "grossly or wantonly and cruelly" neglected to provide for her. Hurlburt v. Hurlburt, 14 Vt. 561. In a number of other cases, where the circumstances attending the husband's neglect were considered aggravating, such neglect has been held to be gross or wanton and cruel.[7]

In the states of Ohio, Kansas, and Oklahoma, the wife is permitted to secure a divorce when the husband has been guilty of "gross neglect of duty." The neglect complained of may be that the husband has failed to provide for the support of his wife, but here again the courts generally hold that the neglect of duty must be gross or flagrant, and something more than "simple neglect."

Mere failure to provide is not gross neglect of duty by the husband. Neither partial nor total neglect to provide constitutes such a cause of action. There must concur with that fact the further fact or circumstance that the defendant treated the plaintiff with indignity; or the failure to provide must be accompanied by some circumstance of indignity or aggravation or insult.[8]

It has been held, however, that "a substantial failure of a husband suitably to provide for his wife's support when he is able to do so is gross neglect of duty, entitling the wife to divorce."[9]

The statutes contain only general language indicating the extent of the husband's obligation to provide for his wife, and in default of which provision she

[6] Mass. Laws 1902, chap. 152, § 1.

[7] Cary v. Cary, 106 Mich. 646, 64 N. W. 510; Whitacre v. Whitacre, 64 Mich. 232, 31 N. W. 327; Dashback v. Dashback, 62 Mich. 322, 28 N. W. 812.

[8] Re Gross Neglect, 8 Ohio S. & C. P. Dec. 701.

[9] Lee v. Lee, 38 Okla. 388, 132 Pac. 1070; Beauchamp v. Beauchamp, 44 Okla. 634, 146 Pac. 30.

will be entitled to a divorce. Such expressions as "suitable maintenance," "common necessaries of life," "reasonable provision," and others of a similar nature, are most commonly used in this connection. But the statutes do not define just what is meant by these expressions, and what constitute the "common necessaries of life," for instance, will depend on the circumstances of each particular case, and is left to the discretion of the court.[10] Undoubtedly, the husband, if able, would be required, under the wording of any of these statutes, to furnish his wife with necessary food, clothing, and shelter, and it has been held that he must supply her with necessary medicine.[11] But the courts do not seem inclined to go beyond this or to require the husband to furnish his wife with additional and reasonable comforts which it is within his power to supply, and although the husband's conduct in this regard may reflect no credit on his character, his wife will not be given relief by divorce if in fact she has been supplied with the necessaries of life.[12] In New Mexico, the wife may be granted a divorce when her husband has neglected to support her "according to his means, station in life, and ability."[13] Under such a statute it would seem that the courts would be justified in going beyond the question as to whether the wife had received the necessities of life, and ascertain whether in fact the support given by her husband was in keeping with his means, station in life, and ability.

As the husband's obligation to maintain his wife is not an absolute one, but depends on his ability and circumstances, the ownership of property by his wife, from which she derives an income, may affect the husband's duty in this regard. So, where the plaintiff possessed property of her own, valued at $40,000, from which her net income was $3,000 a year, and her husband's property did not exceed in value $500 and he was dependent on his own labor for his support, a divorce on the ground that the defendant had failed to provide plaintiff with the necessaries of life was denied. The theory upon which the courts act in such cases was stated as follows:

> The court's power to refuse a divorce upon the ground of nonsupport where the complaining spouse has an income from separate property is somewhat analogous to the authority to relieve a party to an action for divorce from the payment of alimony where it is not necessary because of her wealth, for the divorced wife's maintenance.[14]

Where the wife has deserted her husband, or has refused to follow him to a home selected by him as a residence, without just cause, she cannot legally require him to support her, or secure a divorce because of his failure to do so.[15]

And when the wife had left her husband, and all the circumstances tended to show that she had not afterwards asked for or expected any assistance from him, she was denied a divorce on the ground of his failure to provide for her.[16]

In California it has been held that if the wife supports herself by her own earnings, she is not entitled to a divorce from her husband, who was capable of earning a living for her, but neglected or refused to do so for the statutory time. These decisions rest on the theory that the earnings of both the husband and wife are community property, of which the husband has control, and that even if the husband himself refuses to work, if he permits the wife to use the money which she earns for her own support, in a legal sense he is providing for her, and so cannot be charged with neglect in this respect. The first case to thus state the law was Washburn v. Washburn, 9 Cal. 475, where the defendant was an able-bodied seaman "of idle habits, and an occasional tippler." For the four years prior to the commencement of the ac-

[10] Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

[11] Thompson v. Thompson, 79 Me. 286, 9 Atl. 888.

[12] Johnson v. Johnson, 4 Wis. 135; Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271, 51 L.R.A.(N.S.) 460.

[13] N. M. Stat. Codification 1915, § 2773, subd. 6.

[14] Baker v. Baker, 168 Cal. 346, 143 Pac. 607, Ann. Cas. 1916A, 854; Beauchamp v. Beauchamp, 44 Okla. 634, 146 Pac. 30.

[15] Beauchamp v. Beauchamp, supra; Roby v. Roby, 10 Idaho, 139, 77 Pac. 213; Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238.

[16] Johnston v. Johnston, 17 Cal. App. 241, 119 Pac. 403.

tion, he had done nothing whatever for the support of his wife, and she had supported herself with her own earnings. In denying the divorce, the court said:

> But the neglect must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her destitute but for the charity of others. If those common necessaries are provided by the earnings of either husband or wife, there is no such wilful neglect as is contemplated by the statute. The earnings of both go into a common fund, and become common property, the control and disposition of which belongs to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree, and the application must fail.

The rule laid down in this case was folowed in Rycraft v. Rycraft, 42 Cal. 444, but in a later case, Locke v. Locke, 153 Cal. 56, 94 Pac. 244, was referred to as a "harsh rule." In Hansen v. Hansen, 27 Cal. App. 401, 150 Pac. 70, the wife was granted a divorce on the ground that her husband for more than a year, because of idleness, had failed to provide her with the common necessaries of life. It appeared that plaintiff earned $40 to $50 a month, embroidering monograms, but this was not sufficient to support herself and child, both of whom were dependent upon the charity of others for assistance. This was the ground on which the decision was based, but the court also reaffirmed the rule formerly laid down that if the wife's earnings were sufficient for her support, even though the husband lived in idleness, she would have no cause for divorce, adding, "while such rule seems harsh, nevertheless, it is the law." In a dissenting opinion by James, J., however, the soundness and justice of this doctrine are denied, although the actual decision of the case is concurred in, and the following language was used:

> Giving the declaration the full effect which its statement imports, a wife who is refused support by an able-bodied husband, who does not work only because he wills not to, must actually starve or receive support from charity before she is entitled to the benefit of the law designed to give her freedom from her worthless mate. If she is driven, in order to gain the bare necessities, to work, then she must renounce the right to pursue the remedy for divorce, and, moreover, the law with great irony will say to her that even what she then earns is community property, within the control of the husband, and which he may take away from her, or perhaps divide. In my view no such situation was contemplated by the statutes. . . . Surely it cannot be contemplated that the wife must support both herself and a shiftless and idle husband, if she chooses to work rather than to beg, and that only by depending upon the charity of friends can she supply a condition of proof entitling her to a decree of divorce.

Assuming that the earnings of the wife are community property, as well as those of her husband, and that therefore, while the husband controls them and permits his wife to use her earnings for her support, from a legal standpoint, he may be said to be providing for her, it has been pointed out that the reason for thus holding would seem to no longer exist when the husband and wife are living separate from each other, and when the statutes in such cases provide that the earnings of the wife are her separate property, over which the husband has no legal right of control.[17]

And in some states, even while the husband and wife are living together, by express statute, the earnings of the wife are community property over which the husband has no management or control.[18]

But regardless of the technical rules of community property law, it is hard to imagine that the legislators of California, or of any of the other states in which the law of community property exists, ever contemplated, when they passed statutes making the husband's failure to provide for the support of his wife a ground for divorce, that he could absolve himself from all blame and responsibility, and escape from the penalties of the divorce law, by showing that in fact he had provided for her by letting her do all the work and spend her earnings for the necessaries of life without interference by himself.

In Arizona, California, Colorado, Idaho, Montana. Nevada, North Dakota, Rhode Island, South Dakota, and Wyoming, the statutes provide that the husband's neglect must have continued for one year before the wife is entitled to a divorce. In Indiana, the statutory time

[17] See note to § 105 of Deering's Civil Code of California.

[18] Idaho Sess. Laws, 1915, chap. 75, p. 186.

is two years, while in the other states where a divorce is permitted on the ground of failure to provide, no particular time is prescribed by statute during which the neglect must continue, to give rise to a cause of action. Where no time is fixed by the statutes, the courts construe them to mean that the duration of the neglect must have been for a reasonable length of time.[19] In Garland v. Garland it was held that where the husband was a strong, able-bodied man, capable of earning a good salary at manual labor, and had left his wife, and positively refused to have anything more to do with her, and had failed to provide for her for practically three months, this was such a reasonable time as would entitle the wife to a divorce.

[19] Garland v. Garland, 66 Wash. 226, 119 Pac. 386; Varney v. Varney, 58 Wis. 19, 16 N. W. 36.

Wm. D. Dunbar

The Home Stretch

Looking backward, contemplating
Years of labor past and gone,
In a court yard stood a lawyer,
Musing quietly alone.
All the worldly goods and chattels
He had gathered were "in hock,"
And of his accumulations
He was sadly taking stock.

His financial inventory
Was as slender as a slat,
Yet with transient fame and glory
It was generously fat.
While his store of mental riches
And experience was good,
It was not a legal tender
For his office rent or food.

Then he thought of fees and cases
And the money he had spent,
And was forcibly reminded
That he hadn't saved a cent.
He had made a hundred fortunes
For his friends of fewer brains,
Who, when fattened from his labors,
Never thanked him for his pains.

Now for silver he was longing
And he hadn't any gold,
But his bills and notes were many—
Some of them extremely old—
And he hoped their patient holders
Their existence might forget
And the law of limitations
Be his benefactor yet.

Then he made resolve to prosper
And he said he'd bravely try
Though his age had got its innings
And the years were rushing by.
For some business he hustled
Till he got it in his grip,
And the dollars that he rustled
Were permitted not to slip.

When his friends would say, "Old fellow,
Seems your hair is getting thin."
He would say, "It's growing thicker,
I can feel it coming in."
And he went to church on Sunday
And he darkened up his hair,
Facing all the world a-smiling
With a brave and happy air.

Fair success and wealth he's winning,
Days of dread are left behind.
As it was in his beginning,
Nothing now disturbs his mind.
As it was in his beginning
He is full of helpful grit,
And though age has had its inning,
He succeeds in spite of it.

Wm. D. Fletcher

Legal Clinics---The Student's Point of View

BY REGINALD HEBER SMITH

THE question of the legal clinic is rapidly coming to the fore. There is beginning to appear a literature dealing with the necessity of giving law students a more practical education and considering the feasibility of using the legal aid societies as training schools in practice. The careful reader of legal periodicals is aware that of late not a month has passed without adding some contribution to the general discussion. Thus, in the March American Law Review appeared Professor Morgan's paper on "The Legal Clinic," the April Illinois Law Review carried as its leading article a treatise by William V. Rowe, of profound importance to American legal education, entitled "Legal Clinics and Better Trained Lawyers—A Necessity," and in May, CASE AND COMMENT presented a spirited interpellation from Dean Wigmore asking, "And Why Not a Legal Clinic?"

The fact that all three articles reach the same conclusion—that it is imperative for the law schools immediately to undertake to give their students a more practical equipment and that the legal aid society offers by far the best existing opportunity for clinical training—is made doubly impressive by the fact that the writers approached the problem from entirely different points of view. Professor Morgan is entitled to represent the faculty viewpoint because no one has been more successful with moot courts and intraparietal practice courses. Dean Wigmore speaks not only as a skilled educator, but as the vice president of the Chicago Legal Aid Society, the second largest organization in the United States, with whose work he is closely familiar. Mr. Rowe knows and squarely presents the position of the practising lawyer-employer, for during his association with the late Joseph H. Choate and with the firm of Sullivan & Cromwell, he had occasion to employ many young law school graduates and ample opportunity to ascertain the deficiencies in their training.

It may fairly be said that, of the four parties directly concerned with this question, three have been heard. The fourth party is the student himself. After all, it is the fate of this embryonic lawyer which hangs in the balance on this discussion; it is through *him* and *his* development and influence that the bar and the state are affected for good or ill.

Shortly after the Spanish War, in the midst of a grave congressional debate as to the retention of the Philippine Islands, during whose course it was argued first that the Islanders ardently desired independence and then that such was farthest from their dreams, some one suggested that much light might be thrown on the subject by consulting the Filipinos themselves. On some such theory, it is perhaps not amiss for the students' point of view to be briefly stated.

If law school faculties believe that students accept the educational *status quo* without questionings, their confidence is misplaced. The curriculum is the subject of endless argument. At Cambridge, in Walter Hastings Hall, there was a group which would always stay up as late as necessary whenever either of two topics was at the bar. One was the nice evidential point growing out of Life Insurance Company v. Hillmon; the other was Theoretical v. Practical Education. This latter became the favorite debate in the public speaking course.

In this argument the great majority of

students have a more than academic interest, because it is necessary for them to earn their living by *practising* law. Most men do not desire to enter the large law offices; they hope, as soon as possible, to set up for themselves individually or in small partnerships. It is well for the independence of the bar that this should be so. But they are frankly worried by the dilemma which confronts them.

They are turned out of law school knowing nothing of practice, and there seems no way to learn even its most rudimentary principles. A clerkship in the large modern law office is of little value. Many a man has spent years in such an office simply looking up law, without ever seeing the inside of a court room, before he realized that he was no nearer his goal than at commencement. There is a gulf fixed between the firm members and the "cubs" across which information does not travel, so that it is difficult even to pick up the crumbs of knowledge which the junior of earlier days obtained in large measure through close personal association in the office and while traveling on circuit. This is not the fault of the law office. It does not pretend to be an educational institution; it is not conducted for that purpose.

The other course is to learn practice at the expense of the first clients. This is not only painful and slow, and calculated to alienate the first comers, but it is a gross wrong to the community. To foist an inexperienced lawyer on a community, to permit him, with the sanction of the state, to hold himself out as "duly qualified" to practise, is as criminal as it would be to permit a doctor to perform a major operation of a sort which he had never even seen. The analogy is sound, and there is no difference either of degree or kind. The patient risks his physical being, the client his property, his liberty, his character. Whether the wound inflicted by the doctor is more serious than the damage done by the lawyer depends only on the circumstances of the case. It must not be forgotten that the lawyer deals with life and with all the things which make life precious.

It should be added that the more conscientious the student, the higher his ideals of a lawyer's duty, the more he shrinks from assuming the responsibility of having a client's rights depend on him. Yet only through that responsibility can he learn the essentials of practice. It is only natural that the student should not contemplate the forks of his dilemma with perfect equanimity.

To the student's mind, "practice" includes everything that one must know in order to apply properly the principles of law to a concrete individual human problem. This definition results from, and is somewhat justified by, the fact that the law school teaches only the principles of law. Everything else is outside the school, and the realm of that unknown beyond is to him "practice." It is not unlikely that this definition is truer than the narrow use which would limit the term to "court practice." What the student earnestly desires to know is everything, from how to take a client's story to levy of execution.

Up to the present, most law schools have shunted off the responsibility for instruction in this vast and vitally important field. Nothing could be more chaotic or more unscientific than the present scheme of affairs. The coming generation of lawyers, instead of being in a position to pull American procedure out of the morass into which it has fallen, are compelled to spend their time in learning how to wade in. If legal education, which Langdell made a science, is to perpetuate its splendid tradition and is to justify itself, it must construct and teach a *science* of practice. The same logic which led Langdell away from textbooks to the case sources should lead the law schools from dogmatic practice courses to the clinic.

A small group of men—in the West with faculty guidance and in the East on their own initiative—have been through the legal aid clinic. Their testimony as to its value seems to be unanimous. The only complaint is that as things are now arranged it is impossible to devote time enough. The experience of all has been nearly the same, and substantially is this: They have learned how to talk with a client and to draw out the crucial facts in the case which, for some reason, a client always omits. They have developed a philosophy of how to deal with

opposing parties and their attorneys. Having drawn a writ or complaint, they understand it better than a course of lectures on "return day," *"ad damnum,"* "teste" could teach them, and having been told by a haughty deputy sheriff that they had not allowed time enough for service and notice, they never again forget the period fixed by law. In determining where the case could be brought so as best to suit the client's convenience, they incidentally learned jurisdiction and venue. They were not too much worried or oppressed during their first trial because they were informed just beforehand that the case was in a court from which, if the decision was adverse because of their own errors, the office could take an appeal and secure a trial *de novo*. Their sympathy aroused by some poor defaulted judgment debtor, they had devoted hours to a study of defaults, judgment, and proceedings after execution to see what could be saved.

All through these proceedings it had gradually dawned on them that much of the law of to-day is not in case books, but in statutes to be found in volumes they had never seen. They realized with something of a shock that statutes are more than an embroidery on the common law, that many decisions depend entirely on statutes, long since amended, and that these very statutes, concerning which they had contracted a supercilious air, often contain excellent common sense and provide superior remedies and procedural shortcuts.

True, all this is only a rough and ready education, but it is vastly better than none. Its great advantage lies in the fact that the legal aid society, with its large intake of cases, finds it simple to sort out the easier cases and start the students with them, gradually working them up to more important matters. This progressive development is impossible for a man starting out by himself; clients have not the foresight to arrange themselves in such order.

The legal aid clinic ought to be the next step forward in legal education. It has been said that the legal aid societies are so few in number and so concentrated geographically that the suggestion has only limited and local possibilities. This is a misapprehension, as the appended list will show. Also, it is objected that the legal aid societies are not sufficiently developed to afford proper facilities. While this is true as to many organizations, the present rapid development of the work gives every promise that the legal aid societies will be equipped and ready by the time the law schools have made up their minds and worked out a plan of co-operation.

Reginald Heber Smith

List of Legal Aid Organizations in the United States

This list is arranged by cities in order that it may serve both as a reference and mailing list. So far as information is available it gives:

1. The name and address of the organization.

2. The name of the attorney and his address when different from that of the organization.

3. The name and address of the president, chairman, secretary, or other executive officer to whom, in addition to the attorney, copies of reports, etc., should be sent.

An asterisk before a name indicates that the organization is in process of formation.

Akron, Ohio.

Legal Aid Committee of the Charity Organization Society, 168 South Broadway, C. L. Dinsmore, Chairman, W. S. Bixby, Secretary.

***Albany, New York.**

Alwin C. Quentel, Commissioner of Charities, City and County of Albany.

Baltimore, Maryland.

Legal Aid Bureau of the Federated Charities, 827 Munsey Building, John Harwood Stanford, Counsel, William C. Coleman, Chairman, 825 Equitable Building.

***Bangor, Maine.**

William E. Walz, Dean, College of Law, University of Maine.

Boston, Massachusetts.
Boston Legal Aid Society, 39 Court Street, Reginald Heber Smith, Counsel, Albert F. Bigelow, President, 89 State Street.

***Bridgeport, Connecticut.**
Legal Aid Committee of the Charity Organization Society, George L. Warren, Secretary.

Buffalo, New York.
Legal Aid Bureau of Buffalo, 181 Franklin Street, Harry L. Nuese, Attorney, John Alan Hamilton, President, 117 Erie County Bank Building.

Cambridge, Massachusetts.
Harvard Legal Aid Bureau, Austin Hall, Carl W. Peanter, President, Fletcher W. Quillian, Secretary.

***Chattanooga, Tennessee.**
Legal Aid Bureau of the Associated Charities, City Hall, R. F. Hudson, Superintendent.

Chicago, Illinois.
Legal Aid Society of Chicago, 31 West Lake Street, Mrs. William E. Boyes, Superintendent, John H. Wigmore, Vice President, 31 West Lake Street.

Chicago, Illinois.
Bureau of Personal Service, 1800 Selden Street, Minnie M. Low, Superintendent, Oscar M. Wolff, Chairman.

Cincinnati, Ohio.
Legal Aid Society of Cincinnati, 103 Lincoln Inn Court, George H. Silverman, Attorney, Robert P. Goldman, Gwynne Building.

Cleveland, Ohio.
Legal Aid Society of Cleveland, 548 Engineers Building, Bartholomew, Leeper, & White, Counsel, Isadore Grossman, Secretary, 1130 Williamson Building.

Colorado Springs, Colorado.
Legal Aid Society of Colorado Springs, Bartow H. Hall, Counsel.

Columbus, Ohio.
Legal Aid Committee of the Franklin County Bar Association, John F. Carlisle, President, Assignment Room, Court House.

Dallas, Texas.
Legal Aid Bureau of the Department of Public Welfare, 719 Busch Building, W. Gregory Hatcher, Attorney, Elmer L. Scott, Director.

Dayton, Ohio.
Division of Legal Aid, Department of Welfare, Reuben R. Holmes, Attorney, D. F. Garland, Director.

Des Moines, Iowa.
Associated Charities, 418 Century Building, B. J. Cavanagh, Counsel, Horace S. Hollingsworth, Secretary.

Detroit, Michigan.
Legal Aid Bureau of the Association of the Bar of the City of Detroit, 518 Moffat Building, Edward Pokorney, Attorney, A. C. Stillwagen, President.

Detroit, Michigan.
Legal Department, Ford Motor Company, Donald S. Kiskadden, Attorney.

Duluth, Minnesota.
Free Legal Aid Bureau, Division of Public Affairs, 201 Christie Building, Frank Hicks, Attorney, W. I. Prince, Mayor.

Grand Rapids, Michigan.
Legal Aid Bureau of the Social Welfare Association, 55 Barclay Avenue, Benjamin P. Merrick, President.

Grinnell, Iowa.
Legal Aid Committee of the Social Service League, 909 Main Street, H. L. Beyer, Esq., Chairman.

Hartford, Connecticut.
Legal Aid Bureau, Municipal Building, Richard H. Phillips, Attorney, Thomas Hewes, 11 Central Row.

Hoboken, New Jersey.
Legal Aid Society of Hoboken, 51 Newark Street, Allan W. Moore, Attorney, Mrs. Charles Campbell, Secretary, 1 Newark Street.

Indianapolis, Indiana.
Legal Aid Bureau, Charity Organization Society, 84 Baldwin Block, Walter Pritchard, Attorney.

Jersey City, New Jersey.
Legal Aid Society of Jersey City, 76 Montgomery Street, William G. McLoughlin, Attorney, Andrew J. Steelman, Chairman.

Kansas City, Missouri.
Legal Aid Bureau, Board of Public Welfare, 43 Water Works Building, Edward J. Fleming, Attorney, L. A. Halbert, General Superintendent, Water Works Building.

Knoxville, Tennessee.
Free Legal Aid Bureau, University of Tennessee, 203 East Main Street, Malcolm McDermott, 802 Holston National Bank Building.

Los Angeles, California.
Walton J. Wood, Public Defender, Office of the Public Defender of Los Angeles County, Hall of Records.

Louisville, Kentucky.
Legal Aid Committee of the Associated Charities, 215 East Walnut Street, W. J. Dean, Attorney, 1303 Lincoln Building, Mrs. Alfred Brandeis, Chairman.

***Memphis, Tennessee.**
Charles M. Bryan, Central Bank Building.

Milwaukee, Wisconsin.
Legal Aid Society of Milwaukee, 707 Merchants & Manufacturers Bank Building, Alma Schlesinger, Superintendent, Hannan, Johnson, & Goldschmidt, Attorneys.

Minneapolis, Minnesota.
Bureau of Legal Aid, Associated Charities, 25 Old Chamber of Commerce Building, Z. L. Begin, Attorney, Dean William R. Vance, University of Minnesota Law School.

Nashville, Tennessee.
Legal Aid Bureau, Commercial Club of Nashville, M. G. Denton, Secretary, Charles M. Morford, Chairman.

Newark, New Jersey.
New Jersey Legal Aid Society, 249 Mulberry Street, Paula Laddey, Attorney, Hon. Thomas L. Raymond, President.

New Haven, Connecticut.
Yale Legal Aid Bureau, Hendrie Hall, Carleton L. Marsh, Secretary, 437 Orange Street, Thomas W. Swan, Dean, Yale University Law School, Hendrie Hall.

New Orleans, Louisiana.
Legal Aid Society of Louisiana, 1406 Whitney Central Building, W. J. Waguespack, President.

New Rochelle, New York.
Westchester Legal Aid Society, 300 Pelham Road, Hon. M. J. Keogh.

New York City, New York.
The Legal Aid Society, 239 Broadway, Leonard McGee, Attorney, Hon. Charles E. Hughes, President, 96 Broadway.

New York City, New York.
Legal Aid Bureau of the Educational Alliance, East Broadway and Jefferson Street, Samuel Sobel, Attorney, Benjamin Tuska, Chairman, 20 Nassau Street.

New York City, New York.
National Desertion Bureau, 356 Second Avenue, Monroe M. Goldstein, Counsel, Walter H. Liebmann, President.

Omaha, Nebraska.
Free Legal Aid Bureau, Board of Public Welfare, 210 City Hall, T. J. McGuire, Attorney, K. L. Schreiber, Superintendent.

Passaic, New Jersey.
Free Legal Aid Bureau, Office of Overseers of the Poor, Municipal Building, James H. Donnelly, Overseer, Ranzenhofer & Ranzenhofer, Attorneys.

Philadelphia, Pennsylvania.
Legal Aid Society of Philadelphia, 34 South 16th Street, Louis W. Robey, Attorney, Rev. Carl E. Grammer, President.

Pittsburgh, Pennsylvania.
Legal Aid Society of Pittsburgh, 610 Bakewell Building, Frederick Shoemaker, Attorney, M. W. Acheson, Jr., President, Oliver Building.

Plainfield, New Jersey.
Case Committee, Charity Organization Society, 323 Babcock Building, Mabelle C. Phillips, Secretary, William M. Wherry, Jr., Chairman, 40 Wall Street, New York.

Portland, Oregon.
Department of Public Safety, Municipal Court, David Robinson, Public Defender, Hon. Arthur Langruth, Municipal Judge.

***Portland, Oregon.**
Legal Aid Committee, Public Welfare Bureau, Thomas Henry Boyd, 1106 Northwestern Bank Building.

***Providence, Rhode Island.**
Society for Organizing Charity, 109 Washington Street, E. Francis O'Neill, Secretary, Judge Charles C. Mumford.

Richmond, Virginia.
Legal Aid Society of Richmond, 1112 Capitol Street, J. Vaughan Gary, Attorney, 1001 Travelers Building, James E. Tyler, Jr., President, First National Bank.

Rochester, New York.
Legal Protection Committee of the Women's Educational and Industrial Union, 300 Cutler Building, Sidney K. Backus, Attorney, Edward G. Miner, Care of The Pfaudler Company.

***Salt Lake City, Utah.**
James A. Smith, 311 Tribune Building.

San Diego, California.
Legal Aid Bureau of San Diego County, Associated Charities Building, 304 Southern Title Building, George H. Stone, Secretary, Seth E. Hazzard, President.

San Francisco, California.
Legal Aid Society of San Francisco, 908 Hearst Building, Alden Ames, Attorney, O. K. Cushing, Chairman.

Seattle, Washington.
Emergency and Legal Aid Department, Young Women's Christian Association, 1118 Fifth Avenue, Miss E. A. Southmayd, Secretary.

***Seattle, Washington.**
Charity Organization Society, 301 Central Building, Virginia McMechem, Secretary.

St. Louis, Missouri.
Legal Aid Bureau, Department of Public Welfare, 238 Municipal Court Building, W. R. Conkling, Attorney.

St. Paul, Minnesota.
Legal Aid Department of the Associated Charities, 726 Globe Building, Kenneth C. McManigal, Attorney, William G. Graves, Chairman, Endicott Building.

***Toledo, Ohio.**
Department of Law, City of Toledo, Carper W. Neilson, Assistant Director.

Washington, District of Columbia.
Legal Aid Society of the George Washington University Law School, 13th and H Streets, N. W., Bates M. Stovall, Secretary, Dean Everett Fraser, George Washington University Law School.

***Waterbury, Connecticut.**
Carroll C. Hincks, 36 North Main Street.

***Yonkers, New York.**
Legal Aid Committee of the Charity Organization Society, 36 Palisade Avenue.

White or Black?

[Editor of Case and Comment:

In looking through the papers of a deceased uncle who at one time had a considerable law practice, I found the inclosed, obviously an address to the jury in some law case. Unfortunately there was no reference to the title of the case, nor anything that would indicate where the trial took place. It is such a remarkable document that I would very much like to ascertain if possible the circumstances concerning it. Would you mind publishing it, in the hope that some of your readers may remember the case?

Respectfully,
"Curious."]

GENTLEMEN of the Jury:—You have heard the testimony in this case and the fate of the prisoner now rests in your hands. His Honor will review this evidence fairly and impartially and will tell you what both the district attorney and myself will concede,—that through a peculiar state of circumstances the question of the guilt or innocence of the prisoner rests entirely upon the paper which has been submitted to you as exhibit 3, and which you will take with you when you retire to deliberate on your verdict. If that paper is white the prisoner is guilty, if it is black he is innocent.

A number of witnesses for the prosecution have told you that it is white, while the prisoner claims that it is black. You yourselves glancing at it as it lies before you might say it is white. You might even go so far as to believe, as my learned opponent asks you to believe, from a mere glance at the paper that it *is* white. But it is just there, gentlemen of the jury, that my learned friend commits a grave error,—an error into which I trust you will not be led by him,—that of making up your mind to the color of that paper from a mere optical examination.

I am willing to concede that when my learned opponent asserts to you that the paper is white, he honestly believes it to be white. I am willing to concede that the state's witnesses believed they were telling the truth when they swore so positively that the paper was white. But where, gentlemen of the jury, in all of the voluminous testimony that has been put before you in the past two days, has any witness stated that he gave the paper any careful examination? Where in all the carefully worded argument of the learned district attorney is there any statement that *he* gave that paper a careful examination? Nowhere. One and all of the witnesses for the prosecution admitted that the only reason they were willing to swear the paper was white was because to their eyes it *seemed* white; not one of them even pretended to have made an investigation to determine whether the semblance was in fact a reality. A mere glance of the eye, a mere inspection, an expression of opinion that does not even pretend to be expert opinion,—that is all.

Gentlemen of the jury, would you convict a man on such testimony? Do we not hear every day of men and women and children mistaking colors? How many railroad accidents do we read of that are due to the mistaking of a red signal for a green, or *vice versa*. We hear the excuse given that the engineer was color-blind. We know that color blindness is extremely common. As a matter of fact, how many people can differentiate between certain shades of blue and green? Are we all color-blind because we differ one from another in our opinions? Are we all lunatics because some of us believe differently from others?

The learned prosecutor will tell you that the cases are not the same; that it is easy to be mistaken between blue and green, but that no one could be mistaken between black and white. But the difference is only one of degree. True, there are experts in color, artistic painters, who might differentiate in shades.

But was any such expert called in this case? And why not? With the great machinery of the state at his beck, was there any excuse for the district attorney to neglect to call such experts?

He insists that the color of the paper is white. But what is color? The scientists will tell us that color is the effect produced upon the eye by the vibrations of light, and that according to the speed of the vibrations, so will color vary. But the scientists do not claim that the same vibration will produce the same effect upon the optic nerve of every individual. To say so would be contrary to known facts.

Heat is a matter of vibration, and the heat waves of a given temperature are always the same. Yet we know that the same heat applied to different persons will produce entirely different degrees of warmth to different individuals. Why? Because individuals are differently constituted, the nerves that carry the sense of warmth to the brain vary as individuals vary; because the sensory nerves of one are more delicate than those of another, so that a more intense heat is required to produce an effect upon Jones than is required to produce that same effect upon Smith. And that means that the identical vibrations appear quicker to Smith than they do to Jones, for the speedier the heat vibration the greater the intensity of heat. Now, while it is plain that one of these men is abnormal, —possibly both are,—which of them is willing to admit that he is the abnormal one?

But scientists tell us also that light is nothing more than heat with quicker vibrations, that when the heat vibrations reach a certain speed, light is produced, and as these vibrations become quicker and quicker the various colors appear. They tell us that the vibrations of the color known as red are slower than the vibrations of the color known as orange or yellow, and they in turn are slower than those of blue or violet.

Now, if it is necessary to have quicker vibrations to burn Jones to the same degree as Smith, does it not follow absolutely that in order to produce the color red to the optic nerves of Mr. Jones there must be more vibrations than to produce that color to the vision of Smith. And as colors differ according to the vibrations, does it not also follow, as day follows night, that what is red to Jones becomes orange or yellow to Smith, to a third man it becomes violet, while to some whose nerves are not so sensitive it might even become black, or possibly produce no color whatever?

How then can anyone say with any positiveness that this paper is white? It may *appear* white to him, but to another it may appear black. And who has the right to say, "I am right and you are wrong?" It may be that this paper appears white to all of you, and therefore you say it is fair to assume that it *is* white. But pause for a moment. In the first place, that paper can appear white to all of you only in the event that your optical nerves are attuned to the same degree of sensitiveness. Now we all know that no two things in nature are the same. Take the largest oak tree and compare any two of its leaves, or, if you please, take an entire forest,—no two leaves would be identical. Is it reasonable therefore to suppose that you twelve men, picked out at random, are all attuned to the same degree in regard to your optic nerves? Does it seem likely?

But you still insist that it seems white to you. That is only because the vibrations given out by the color on that paper happen to be of that character which to each of you represents white. But does that mean that the paper is white? As it is highly improbable that any two of you are identical in optical sensitiveness, is it not more than likely that the vibrations which to juror No. 1 imply white are the vibrations which to juror No. 2 denote red, to juror No. 3, green, to juror No. 4, violet, and to the prisoner at the bar, black? How, then, where there is so much variation, and when you are bound according to his Honor's charge to acquit the prisoner if there is a reasonable doubt in your minds,—I ask you then, how can you as honest men, sworn to do your duty, find otherwise than that there is at least a reasonable doubt as to the color of that paper?

But I will go further. Let us assume for the sake of argument that the learned district attorney is right when he says

that it is white. Now scientists will tell you—and nobody, not even the district attorney, will deny it—that what we call white is really nothing but all the colors of the spectrum seen together. Scientists will tell you that when you look at a piece of so-called white paper, you are seeing all the colors of the rainbow. We must all accept that as true, even though it may be that some of us do not really believe it? For it is true, or science means nothing. So then we must believe that this paper, if it be white, as you are asked to find, is really violet, indigo, blue, green, yellow, orange, and red. But when you come to look at it,—and mark you, gentlemen, this is all the test the district attorney asks of you in order to satisfy your minds that it is white,—when you come to apply his test of looking at it, do you see any violet, do you see any indigo, any blue, green, yellow, orange, or red? And yet those colors are there, according to the learned district attorney, and according to him you must depend upon the test of your eyesight to find them there. Assuming he is right, must you not believe that your eyes do not tell you the truth? And yet it is upon your eyes that the district attorney relies in this case, and only on your eyes. He rests his case solely on your eyesight, for he has offered no other evidence.

I say to you, then, that when you know the paper which your eyes seem to tell you is white is in reality all the colors of the rainbow, you have absolutely no right to let your eyes decide the color of that paper when a man's life hangs upon your decision. And bear in mind, gentlemen, this is not a case of optical illusion, such as is the case when a flickering light causes you to believe you see a mouse in the corner when none is present, or when through an ingenious arrangement of mirrors on the stage you apparently see a trunkless woman, living and speaking to you. There is no trickery in modern science.

And now let us go just one step further and satisfy ourselves that not only is the paper not white, but that it is in reality black, as the prisoner contends. We all know that there are only seven colors visible to the human eye. I have enumerated them before. You all agree that you do not see any one of them here on this paper. Obviously then if there be no one of these colors present, the paper has no color at all. To be sure I am asking you to apply the eye test, but that is the district attorney's test, and he cannot object to my appropriating it. Let us now look up the definition of black. We find, again resorting to the scientists, that black is not a color, but is the absence of all color. If now we have all agreed that we do not see violet, nor red, nor any of the other colors known to the human eye, is it not then at once too plain for argument that as you see no color at all, and as no color means black, the paper must be black, for things equal to the same thing are equal to each other?

Can you then, gentlemen of the jury, as sane, logical men, following me as I have led you logically and scientifically from premise to conclusion, step by step, come to any other conclusion than that the paper is black and the prisoner innocent?

A Most Extraordinary Case

BY HON. JAMES C. JENKINS

A NOTED lecturer once said that one of the virtues of the immortal Lincoln was that he would never defend a client whom he knew to be guilty. This is hardly to be counted a virtue, if true; but I don't think it is substantially true. It is remarkable, however, that some great minds have been puzzled over this question.

There seems to be little room for controversy as to the lawyer's ethical, and there is none as to his legal, duty.

Every person charged with crime is constitutionally entitled to a fair trial by an impartial tribunal to warrant conviction and punishment; and to secure this he should have the assistance of competent counsel whether guilty or not, unless he elects to waive his right to an attorney. Surely it is not "up to" the attorney to prejudge the guilt or innocence of his client. This is for the court and jury or judge, as the case may be.

For twelve years I was a judge in the Philippines, and during those years thousands of persons came before me for trial, charged with one crime or another. (The judge in these Islands decides questions of fact as well as law.) The case of Felipe Oria was one of the most unique and sensational. Felipe was an exceptionally large, robust, and muscular man for a Filipino. He had a wife and five children. The wife was intelligent, healthy, strong, and good-looking. The children were all far above the average in looks and intelligence. Viewing them all together, one would hardly suspect domestic trouble or family jars. But it developed that Felipe was fonder of another homely woman than he was of his handsome and lawful spouse, notwithstanding the latter had borne him these five attractive children, and was herself above suspicion.

Some ten years ago Felipe was arraigned before me for trial on the charge of parricide. Under the Spanish Penal Code (of force in the Islands) parricide embraces uxoricide, and is punishable with death or life imprisonment, according to circumstances.

Felipe was represented by an able young American attorney, who did the best he could for his client; but the evidence for the prosecution seemed to be so overwhelming against Felipe that his attorney elected not to place Felipe on the stand to testify in his own behalf for fear that Felipe would merely accentuate the testimony against him on cross-examination, and harm, rather than help, his defense, which guilty persons nearly always do. Nor did he introduce any other witness for the defense. Indeed, Felipe appeared to have no defense, which his lawyer fully realized.

It was alleged against Felipe that at a certain time and place he had killed his wife with treachery, after having manacled her by superior force, and in the nighttime, these being aggravating circumstances carrying the death penalty, in the absence of extenuating circumstances.

From the evidence there seemed no reasonable doubt of guilt. Two of the children testified that their mother was last seen by them in the company of Felipe and a young man nineteen years old. This young man swore that he was an eyewitness to the crime; that he saw Felipe at the time alleged manacle his wife and then cut her head off with his bolo; and, having done so, he threw both the head and body into the Agno river; that Felipe tied a basket filled with clothes to her back before cutting off the head; that Felipe had first manacled him and left him upon the ground near by the river bank where he threw the head and body into the river; that Felipe then warned him that if he disclosed what had become of the woman, he would deal with him in the same way.

The children testified that their mother had not been seen nor heard of since the night the three left Felipe's home together to visit a nearby town on business, although diligent search and investigation had been made. This evidence also showed Felipe's motive for the killing, so that Felipe's guilt was fully established, if the witnesses were credible. The young man's testimony was corroborated by that of the children, and by the circumstances. And there appeared no reason why the young man should swear falsely. There was nothing in his deportment or manner of testifying that indicated that he was telling anything but the truth. Indeed, the evidence disclosed that Felipe was his friend. It was not even suggested by Felipe's bright young attorney that the woman had not been killed by somebody; *per contra,* the *corpus delicti* was admitted *ab initio.* However, in view of the death penalty that awaited Felipe if found guilty, the court was very cautious and did not decide the case for some three weeks. Meantime, Felipe was placed in the murderer's cell, and is said to have lost 20 lbs. in weight in those three weeks, because he felt sure that the court would convict and sentence him to be hanged; and his attorney was of the same opinion. Both of them believing that Felipe would be hanged if convicted, his attorney requested that Felipe be allowed to withdraw his plea of "not guilty" and substitute a plea of guilty. This request was made because the attorney hoped that the penalty of life imprisonment might be imposed in consideration of the plea of guilty.

The request was granted. Felipe appeared in court and in person withdrew his first plea and pleaded guilty. Thereupon his attorney begged the mercy of the court and Felipe was sentenced to Bilibid prison for life.

This disposition of the case was quite a relief to the court, because it had some misgiving, although there was no reason whatever to discredit any witness, except that the case in general was most extraordinary. Felipe was taken to Bilibid. Some six months thereafter I received through the mail a document purporting to be an affidavit of Felipe's wife, whose head Felipe confessed he had cut off and then thrown both head and body into the river.

After reading this affidavit I handed it to my interpreter with instructions to pigeonhole it, though I did not treat it seriously, the facts related therein being so extraordinary that I did not credit it as a declaration of the alleged dead woman.

A few days thereafter another American lawyer of the town (Lingayén) wrote me a note telling me that Felipe Oria's wife and five children were in his office and would like to appear before the court. I ordered them to be brought at once into court and had them all sworn as to the identity of the woman. This testimony and that of two other witnesses satisfied me that Felipe had not killed his wife, although he had voluntarily and in person entered a plea of guilty as alleged in the formal information; but that he had attempted to take her life by drowning; that he had actually manacled her and tied a basket of clothes upon her back and then thrown her into the river; but that he had not cut her head off before doing so, as the young man had testified. This young man was by my order prosecuted for perjury, and he pleaded guilty, stating that he thought Felipe had cut off the head before he threw his wife into the river, as Felipe had his bolo with him.

It seems that the basket of clothes saved the woman, as she was in fact bound hand and foot, so that she could not swim. The two witnesses mentioned testified that, on the night of the alleged killing, they came along the river in a banca (a small boat, made of a log, like a trough) and observed the basket floating on the surface of the water; that upon taking hold of it to pull it into the banca, they discovered the woman's body to which the basket of clothes was attached; that at first they thought the woman was dead, but that after a while they noticed some signs of returning life; and that when they reached the next town on the river side, they delivered the unconscious woman over to a doctor.

The wife testified that her husband had tied her hands and feet and the basket of clothes upon her back and thrown her into the river; that she remembered noth-

ing more that happened after that till she fully regained consciousness at the house of the doctor where the men who had rescued the body left it for medical attention.

She explained that she had not returned home sooner to her children because she did not know that Felipe had been sent to the Manila prison; that when she learned that he was in Bilibid for life, she returned home; that she was afraid to go back home so long as she believed that Felipe was there; that immediately upon her return she reported the matter to the court and other authorities. Upon my recommendation the governor general commuted the life sentence to fourteen years, the penalty for attempted uxoricide. This narrative is not exaggerated nor embellished in the least. I have not since been much in favor of capital punishment; and believe that a lawyer should always defend his client whether he believes the client guilty or not.

The Justice of the Peace

Yep! I'm the Jestice of the Peace.
Hev bin fer thirty year.
And ef you knowed the things I know
Thet wouldn't seem so queer.
The folks round here all knows I'm wise,
I've done fer 'em so long;
They aluz come right straight to me
When anything goes wrong.

They ain't no need fer lawyer sharks
Fer the people as knows me.
I does the work much bettern them
And charge no biggish fee.
I'm onto all their tricks and turns,
And that they all well knows.
And they don't get fresh in this here
court,
Fer none of that stuff goes.

I deals out jestice right and left;
Writes wills and deeds and such.
My writins as legal as any can be
Tho my languige it ain't much.
But jest the same my Latin words
Is as numrus as a lawyer's is,
An when I use em, as I frequent does,
Folks knows I knows my biz.

Sometimes, of course, when a man's
gettin sued
He'll hire some lawyer sport
Who won't agree with what I says
An appeals to a higher court.
Jes as if I didn't know all the law
As well as a Soopreme Judge!
But what these bigger paid fellers says
Don't never make me budge.

They gets their sayins printed in books;
I read some of 'em once,
An I concluded, when I got through,
Thet the orthur were a dunce.
He'd got his words all jangled up
An I reckon ef he'd had it to do,
He couldn't uv told what he meant
hisself,
Ef he'd had to read 'em through.

No, thar ain't no one who kin tell me
what,
When he comes to this Jestice place,
An ef they *think* they kin, when they sees
me set
They jest ain't got the face.
Fer I've bin at it fer thirty year
An I knows all anyone knows,
An the lawyers and folks all hereabouts
Knows thet what *I* says—GOES.

R. D. Gray.

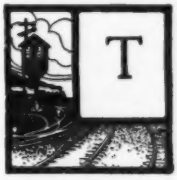
The Twin River Trouble Man

BY EDGAR WHITE

Macon (Mo.)

"My donkey stood on the railroad side,
Your train came whizzing by,
The driver grinned, and pulled 'er wide,
And knocked my mule sky high!

"No sound of bell came o'er the hill,
No friendly warning toot,
And if you do not pay my bill—
By George! I'll enter suit."



THE above, written with a quill pen, on bluish paper like they used to use in court, and a rough sketch of the suggested catastrophe, was in a cheap frame hanging over the desk of Uriah Swift, "trouble man" for the Twin River Railroad. The record above cited was completed in Mr. Swift's own handwriting: "Judgment for defendant."

In a nutshell the thing was a tribute to Mr. Swift's efficiency in handling delicate controversies for his road. He said he preferred it to a diploma from a law school, because a diploma was only evidential as to what a man might be able to do, while this framed record showed what he had done.

"Results are what count," declared Uriah, "not good looks and sheepskins."

Mr. Swift's features were as noncommittal as to his age as he was when dealing with a claimant. He wasn't exactly old, nor was he young. No one ever heard him complain of being tired or overworked. He could cover more miles, and look after more business in a day than any youngster in the service of the line. Personally, Uriah was about as attractive as one of the mud-spattered switch engines that shunted cars about in the Clifton Junction yards, and like them he was full of ginger.

In Uriah's code the greatest crime was to sue the road. There could be no such thing as a just cause of action against his common carrier. So he fought everything that came into his department with every weapon in his armory, arguing that a householder was always justified in taking every possible advantage of a burglar who sought property of others without due consideration.

One day,—this was not long after the war between the states,—business took the Trouble Man to the Village of Valley Crest, and while in the office at the depot there a dapper little man entered, removing a large felt hat deferentially.

"This Mr. Swift, ze claim commissionaire?" he asked.

"I'm the claim attorney," admitted Swift, with a hostile look.

"I haf two pigs—ze fine stock—"

"They're always fine—road couldn't kill anything but pedigreed stock," interrupted Swift.

"Even so," smiled the claimant. "Twenty dollars apiece they're worth. I settle for thirty—the two."

An angry retort was on Swift's lips, but as an idea occurred he changed his tactics.

"What is your name?" he asked.

"Count Henri de Neville—a native of France I am,—but now living on one little estate near this settle-ment. I raise pigs, and ze cow and grain—"

"And two of your hogs were killed by our trains?"

"Yes, saire,—two fine pigs, the fence of ze trainway being down—"

"All right, Count," remarked the Trouble Man with marked friendliness; "you just file your claim with us and we'll look over it, and if it's just we'll pay it."

"Thank you, saire! Your courtesy delights me. I rest content in your assurance."

They shook hands, and the Count went out. The claim was duly sworn to and sent in. No reply coming in four

months, Count de Neville penned an apologetic letter for again referring to the matter! doubtless more weighty affairs had occupied Mr. Swift's attention and he could not be blamed for neglecting so small a matter as a couple of pigs over at Valley Crest, but if he could tear himself away from the grind long enough to pass on the claim, the Count would forever be grateful for the consideration, etc.

Mr. Swift grinned and lighted his pipe with the note.

"No hurry," he murmured. "He's not needing the money."

Two months and a little over brought another polite note from the claimant over at Valley Crest. This Mr. Swift promptly and courteously answered.

"Mr. dear Count," he wrote, "regret to inform you that your claim is barred by the statute of limitations. Under our law, suit has to be filed within six months after origin of alleged cause of action.

"Very respectfully,

"Uriah Swift, claim attorney."

When he received that letter Count de Neville called on his friend, Squire Abe Gashlock, and asked to be shown the sections relative to actions for damages in justices' courts. He spent the greater part of the day mastering that part of the law. Then he went out to his estate and carefully examined the right-of-way fence between his land and the railroad. Within two or three days he had lodged with Squire Gashlock a suit for $175 for the death of a mule, alleging it had broken through the right-of-way fence and met death at the "hands" of the railroad.

"Old duffer's learned a trick," grinned Mr. Swift, as news of the action reached him in due course of mail. "Well, I'll teach him another. Of course the Squire will give judgment against us by default, then I'll send a bond over and we'll appeal to the district court, where a railroad will have some show for a square deal. If we don't get justice there we'll keep on going up till we do."

The Trouble Man wasn't a bit uneasy. He knew exactly what to do.

One day Count de Neville sauntered into Squire Gashlock's court, selected a chair, tilted it against the wall, and fanned himself. After they talked awhile on the weather and crops, the Count casually inquired if there was anything doing.

"Not a thing," replied the court. "Never seen things so dull,—will be till after hay harvest, I guess. By the way, the railroad filed that bond."

"Would your Honor mind letting me see it?" asked the Count, with but little show of interest.

The Squire fished the document out of a pigeonhole, and handed it to his visitor, who perused it indifferently.

"Know ze men on this paper, Squaire?"

"No—not personally."

"Good for $200, I dare say?"

"Oh, I reckon so."

"Do you know, Squaire?"

This time Count de Neville seemed to be in earnest. Squire Gashlock slid his feet from the desk to the floor with a bang.

"I zounds, I don't!" he exclaimed. "Do I have to know that?"

"Ze book, Squaire,—turn and see."

Squire Gashlock picked up his big law guide, and there, plain as print could make it, was the requirement that he know the absolute solvency of those who signed bonds.

"By Gad! It's a fact I don't know these fellows. They may be worth a million, and they may not be worth ten cents. What'll I do?"

"You might send it back and request zat they warrant ze bond good," mildly suggested the Count.

It was clearly the only practical thing to do. The return mail brought the squire a special delivery envelop and a certified check for $200, and a bond signed by names worth a million.

"That sure is all right," muttered the Squire, after a careful inspection. "If the bond ain't good, here's the actual cash,—it's what I call gilt-edged security."

Count de Neville dropped in just as Squire Gashlock announced his approval of the bond. In his hands was an almanac.

"Ze case called, defendant come not, judgment for ze plaintiff, June 3," murmured the Count.

"Right you are,—got it here on the book."

"Ze bond approved June 15?"

"Yep. Say—that's over ten days!" exclaimed the Squire. "I zounds! They're out o' court! Too late to appeal now! They got to pay! But that's a big question. How can I make 'em?"

"Ze law, Squaire, made and provided, in ze book zay you get out a—a—ah—executioner."

The mantle of night was giving place to rosy dawn over the cottonwood forest crowning the hills east of the Valley as Dannie Mulqueen pulled to the limit his lever, throwing into the cylinders of his big "choo-choo" 200 pounds of dynamic energy to the square inch. For Dannie had to make the long climb into Valley Crest with a middling big string of cars, and it was no joke getting up that hill of an early morn, when the rails were weeping with dew.

As a general thing Dannie's big engine gave a couple of snorts in the environs, and shot through Valley Crest like a cyclone that was behind time on an engagement with a Kansas prairie village, but this time there was a break in the continuity of humdrum events. The agent swung a red lantern across the pathway of the flyer, and lest the engineman might be indifferent about the signal of the road, there was a heap of old ties and things piled up in the middle of the track awaiting the "cowcatcher."

Dannie, half an hour behind time, was red-headed in two ways. But he stopped, and stepping to the gangway between engine and tender, was inquiring what the blankety—blank—blank was the matter, when—

"Would ze enginaire and ze stoker please step to ze platform a little moment while some business with the road was fixed up?"

In front of the gentle voice was a thing that looked to Dannie like two engine stacks spliced together, and whichever way he turned, they seemed to be pointing at his head. Standing beside Count de Neville and his double-barreled gun were two husky Alabama negroes, one carrying a log chain.

Dannie and his fireman swung down to the platform and, in obedience to a courteous indication by the Count, stood with their faces to the wall of the depot. Then the big negroes ran their log chain through the rear drive wheels of the engine, and anchored them securely to the track.

While this was proceeding the conductor came running out, wanting to know. He, too, got an unclouded view of the working end of the Count's shotgun, and took his place in the line by the depot wall.

Scared passengers tendered watches, pocketbooks, story books, bonbon boxes, cigars,—everything they had; all they asked was that their lives would be spared, and they would henceforth devote their days to repentance and good works. The Count turned a rosy red as a girl came up to him and began reaching into her stocking for the valuables she hoped would ransom her. Gallantly the "train robber" doffed his hat and bowed nearly to the platform.

"Oh, Mam'selle!" he murmured, "not for ze world would I hurt one gold hair of ze pretty head!"

Behind the flyer was a long freight train, the engine's safety valve spouting a column of steam high into the air as its crew cussed and waited.

In the general offices at Clifton Junction came hustling over the wire news of the busy morning at Valley Crest. Pat Houlahan, superintendent, ordered the agent there to hustle out the justice and swear out a complaint against Count de Neville, charging holding up the United States mail, attempted train wrecking, threatening lives of passenger and crew, and anything else the circumstances seemed to warrant,—"be sure to get in enough to stick the old duck, and tell the Squire we'll stand by the prosecution to the bitter end! Get a move on!"

Agent Baxter wired back that Constable Ike Dobbins had gone down the river on a fishing expedition, and that Squire Gashlock had appointed Count Henri de Neville to serve in the absence of the regularly elected officer; that in the early morning the Count had entered the railroad office, duly presented his commission and star, and then showed an execution to cover the death of a mule, valued at $175, and two pigs, $30, a total

of $205, or with interest and costs $230. If there was any doubt as to the legality of the proceedings, Squire Gashlock said he would be pleased to telegraph the statutes upon which the action was based, if the railroad would stand the tolls.

Houlahan entered the private office of the Trouble Man, who was sitting at his desk, above him being the poetical obituary of the donkey referred to in the beginning. Just then the despatcher stepped in and with some excitement announced that No. 25, with twenty cars of stock, was blocked by the passenger at Valley Crest, and that directly behind was "15," with a long string of refrigerator cars. The stock men had threatened to kill the agent for making them miss that day's market.

"Uriah," Houlahan asked of his Trouble Man, "what did you do to that fellow over at the Valley?"

"Not a thing in the world. He wanted to sell us a couple of scrub hogs for thoroughbreds, but forgot to bring suit in time; that's all."

"Did you tell him you'd look into his claim?" asked the superintendent with growing sternness.

"Yes, but—"

"Did you?"

"It was this way—"

"Did you keep your word with him?" demanded the superintendent.

"Not exactly,—that is, I told him I'd see about it, and then when he forgot to file suit I didn't think there was any use for us to worry,—the world's full of these grafters."

"I see," returned Houlahan. "Uriah, you can go back to the farm. I'll take care of this case."

Houlahan wired the agent at Valley Crest to get the money from the local bank, settle the Count's claim, and let the trains move on.

Within a few moments Agent Baxter turned in this disquieting news:

"He won't let up till somebody apologizes to him, he says."

Houlahan turned to the Trouble Man.

"Uriah," he remarked, "seems to be up to you."

"Not much it ain't!" returned Mr. Swift. "You fired me,—I'm going back to the farm. Never did like the railroad business much, anyhow."

The despatcher came in and nervously informed the superintendent that No. 22, fast east-bound passenger, was on the siding west of Valley Crest, and the chances were it would miss connections with the Southern express at the terminal if it wasn't released right off; it had two cars of rush express stuff and a million in bullion going to the mint.

Houlahan glared at his ex-claim attorney. Then he ground his teeth together, walked over to a desk, and scratched this out for the agent at the seat of war:

"Agent Valley Crest: Present my compliments to Count Henri de Neville along with check for his claim and costs. Tell him we regret exceedingly having offended him, and that if he will come over to Clifton Junction in the near future I will take pleasure in showing him how well the Twin River road can entertain its friends. Houlahan, Superintendent."

When the Count read that he walked over to his line-up, his hand on his hip pocket.

"Hold on, Count!" cried Engineman Dannie; "don't shoot! I'll be good."

The Count produced a flask.

"What's that?" asked Dannie.

"Grape juice."

"Grape juice! Would ye pizen me?"

The curtain of the Count's left eye slowly closed part way down and then raised again. You remember that was back in the days when John Barleycorn traveled in the best society. Dannie grasped the flask, no longer doubting.

"Here's to you and yours, Count!" he cried. "And from now henceforth may the good fairies keep your pigs and cows and mules safe at home when the steam cars go sailing by."

Uriah Swift? He got the Count to buy him an "estate" adjoining, and he is now a happy and prosperous farmer and raiser of pedigreed stock. He gets fancy figures once in a while—mostly from the railroad.

Edgar White,

Editorial Comment

Case and Comment

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Effect of War on Partnership with Alien Enemy

CONTRACTS of partnership, it is stated in L.R.A.1917C, 669, are necessarily dissolved by war between the countries where the respective parties are resident as involving the necessity of continued intercourse. Thus it is said in Hanger v. Abbott (1867) 6 Wall. 532, 18 L. ed. 939, that partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations. So it is stated in McAdams v. Hawes (1872) 9 Bush, 15, that the attitude in which partners become placed as antagonist enemies not only renders unlawful such amicable communication as is necessary to the carrying on of partnership business, but is obviously inconsistent with it, the objects and ends of partnerships being generally the joint application of the skill, labor, and enterprise of all the partners, as well as of their funds. This rule is based upon considerations of public policy, and is not affected by the intention of the parties; and an agreement between partners who are citizens of enemy states that the partnership shall continue is against public policy and void.

Decisions as to the relative rights of the parties after a dissolution thus affected are comparatively few. Each partner remains bound to account to the other for the proceeds of the partnership property, though not for points thereafter made by a continuance of the business.

Where the partnership business is located in one of the belligerent countries, the partner in the other country, it is held in Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie [1916] 1 K. B. 763, 85 L. J. K. B. N. S. 847, 114 L. T. N. S. 180, [1916] W. N. 76, 32 Times L. R. 299, is entitled to have his interest in the partnership at the date of the dissolution valued, including his share of the good will, if any, and to be paid the amount thereof when payment becomes legally possible; and he has an equitable lien on the partnership assets for the amount due to him. The remittance to the partner in the enemy's country of the value of his share in the partnership property being unlawful during the war, he is not entitled to interest on his capital during such period.

After the supervention of war, neither can bind the other by dealings in the firm name; and express notice of the dissolution need not be given. Nor can one claim the benefit of acts done by the other in the firm name. The parties remain

bound, however, for all antecedent engagements; and the partnership may be said to continue as to everything that is past and until all pre-existing matters are wound up and settled. The absent member must be deemed to be represented, in respect to engagements existing at the time when war breaks out, by the representatives of the firm remaining within the jurisdiction of the belligerent whose authority extends over the place of business of the firm, and as in respect to property and rights there existing, so in respect to obligations and liabilities created before the war, he must share the fortunes of the firm. Accordingly, notice given to the local representative of a firm of the dishonor of a bill indorsed by it before the war will bind the absent partner.

An apparent exception to the rule that war will dissolve contracts of partnership with alien enemies exists in the case of owners of a vessel, the relation between them not being that of partners, strictly speaking, but rather that of cotenants. So, it is held in Caldwell v. Harding (1869) 1 Low. Dec. 326, Fed. Cas. No. 2,302, that part owners of a vessel who, during the war, were alien enemies, may, after the war, recover their share of freights earned by and insurance money collected on the vessel.

Lack of Uniformity in Workmen's Compensation Laws

INDORSEMENT of the underlying principle of workmen's compensation laws, and constructive criticism of their practical application, are the chief features of a report on "Workmen's Compensation Acts in the United States—the Legal Phase," issued by the National Industrial Conference Board.

Thirty-seven states and four territories of the United States now have compensation laws, and a Federal compensation act for civilian employees was adopted in September, 1916. The compensation principle now applies to more than two thirds of the wage earners in the United States.

The laws of the various states reveal curious and glaring inconsistencies. West Virginia, Michigan, and California exclude traveling salesmen from compensation benefits; Minnesota includes them only if employed by a Minnesota employer; New Jersey includes them while in the state, even though they are not residents. Domestics and casual laborers are usually excluded. In numerous industries, particularly agriculture, compensation acts do not apply to the small employer; the effect of this is to exclude a considerable proportion of the country's workers from the benefits of these acts. Agricultural labor is specifically included under compensation legislation by only one state, New Jersey; in twenty-three states it is specifically excluded.

In eight states workmen's compensation acts are compulsory upon the employer. In twenty-four states he has an election, but if he does not accept, he must forfeit some or all of his common-law defenses in any action brought by or in behalf of his injured employee. In twenty-three of these twenty-four states the employee likewise has an option; in Texas, he is bound by his employer's choice. In fifteen states acceptance by both employer and employee is presumed unless either definitely rejects; in several states there must be a formal notice of acceptance.

In twenty-five states the employer affected by compensation acts must either insure his liability or demonstrate his financial capacity for self-insurance. In several states contribution to a state insurance fund is obligatory.

Classification of "hazardous" occupations is very uncertain in the various acts. Although private insurance experience shows many forms of agricultural employment to be more dangerous than mechanical trades, agriculture is nowhere designated by compensation acts as a "dangerous" or "hazardous" occupation.

Another source of conflict lies in the significance given to the term "accident." In the English Compensation Act, largely used as a basis for American legislation, the liability is expressed by the phrase "personal injury by accident arising out of and in the course of employment." In the compensation acts of fourteen states this language is followed identically; in others, the words "by accident" are omitted, thus broadening the liability; in

some cases, the words "out of" are also omitted, further extending the liability to cover injuries received in the course of employment, although the occupation had no direct connection with the injury. For instance, the Ohio Industrial Commission awarded compensation to the dependents of a stenographer because, while taking dictation from her employer, she was murdered by a jealous suitor; the New York Industrial Commission awarded compensation for the death of a street railway process server from gangrenous diabetes alleged to have resulted from having his toes trodden upon by a fellow passenger in a street railway car of the company which employed him.

In this country "occupational diseases," as a rule, are not included under the term "accident" in workmen's compensation acts, but in the administration of these acts an increasing tendency to include many forms of diseases contracted during employment is evident.

The board ascribes the dissimilarities partly to wrong conceptions of the underlying principle of workmen's compensation, but more largely to the influences set up by local tradition, local phraseology, varied political and social conditions, and, in some states, to constitutional limitations.

Several important constructive suggestions are submitted.

First. That the various states, in order to reduce existing conflict and uncertainty, immediately undertake to establish a permanent, scientific, and uniform system of compiling accident statistics. This would be a great step toward determining definite standards of liability and equitable compensation rates, and would enable legislators to judge the real hazards of various occupations and "permit the just extension of the compensation principle to many workers now arbitrarily excluded from its terms."

Second. Clear distinction in statutes between the terms "occupational disease," "accident," and "injury."

Third. Direct settlement of claims between employer and employee, the interests of the employee to be properly safeguarded.

Fourth. An exclusively compulsory system of compensation is indorsed on the ground that it would eliminate many technical uncertainties.

This report on the legal phase of workmen's compensation acts is to be followed by other reports on the medical, economic, and administrative phases.

Child Labor in Warring Countries

"THE experience of war time has only demonstrated the necessity,—technical, economic, and even physiological,—of the labor laws enacted before the war. In our legislation secured in time of peace we shall find the conditions for a better and more intense production during the war."

These words of M. Albert Thomas, the French Minister of Munitions, illustrate perfectly the official attitude of both France and England after two years of emergency exemptions for war industries, according to the Children's Bureau of the United States Department of Labor, which has just completed a brief review of all available reports on child labor in the warring countries.

In France and England, earlier standards of hours are being restored, not only to protect the health of the workers, but for the sheer sake of industrial efficiency, present and future. In Italy, the Central Committee on Industrial Mobilization has taken steps in the same direction. In Russia, a year before the revolution, a movement was under way to raise the age limit for children in industry.

Canada, Australia, and New Zealand, in spite of the great armies of men they have sent to the front, have maintained their labor standards with little or no variation. Victoria has slightly increased the amount of overtime which may be permitted to women and children in special cases. On the other hand, Manitoba has reduced its legal overtime. No change whatever in restrictions on woman and child labor is reported from New Zealand.

The Children's Bureau sums up as follows the child-labor situation in France and England:

France, after almost two years of wartime exemptions by which children under eighteen were allowed to work at night in

special cases, restored the night-work prohibition for girls under eighteen, and provided that other night workers should be subject to medical supervision. The reason for this is indicated not only in the statement by M. Thomas, quoted above, but again in the following extract from the French official Bulletin des Usines de Guerre for July 31, 1916:

> With the continuance of the war it becomes necessary not only to find the best possible disposition of the forces available for our war industries but also to avoid every cause for the exhaustion or weakening of the labor employed in our factories. There is a close relation between the conditions in which we place our workers and the improvement or the increase of our war products. For the very sake of the national defense we must conserve all their physical strength for the workers who are responsible for the manufacture of arms and for the output of our factories.

France has now under consideration an education bill which would in effect raise the standard of labor protection in war time. It was introduced in the Chamber of Deputies in March by M. Viviani, and closely resembles a bill passed by the French Senate in June, 1916. This proposal to establish a system of continuation schools and to require part-time school attendance during working hours by all working children under seventeen years of age has the endorsement of the Minister of Commerce and of business interests in all parts of the country.

A similar advance has been recommended in England by the Departmental Committee on Education for Juvenile Employment after the war. This committee also advises an effective fourteen-year age limit for required school attendance, without the exemptions permitted by the present law. Supplementary estimates for educational purposes have been presented to Parliament by the government which look toward a strengthening of adolescent education along the lines suggested by the committee.

In England as early as 1915 some employers returned to regular labor standards. The British Chief Inspector of Factories and Workshops writes in May, 1916:

> The tendency grew as the year passed to substitute a system of shifts for the long day followed by overtime, and this is particularly reported of munition factories in the Midlands and in Sheffield. . . . The number of days on which overtime was actually worked tended in many factories to decrease as experience grew of accumulating fatigue and lessened output. Probably for similar reasons Sunday labor also has tended latterly to decrease.

The reports of the British official Committee on the Health of Munition Workers on the waste involved in the long hours worked during the war are well known. They urge the restoring of restrictions, and are full of such statements as the follows:

> Even during the urgent claims of a war the problem must always be to obtain the maximum output from the individual worker which is compatible with the maintenance of his health. In war time the workmen will be willing, as they are showing in so many directions, to forego comfort and to work nearer to the margin of accumulating fatigue than in times of peace, but the country cannot afford the extravagance of paying for work done during incapacity from fatigue just because so many hours are spent upon it, or the further extravagance of urging armies of workers towards relative incapacity by neglect of physiological law.
>
> Conditions of work are accepted without question and without complaint which, immediately detrimental to output, would, if continued, be ultimately disastrous to health. It is for the nation to safeguard the devotion of its workers by its foresight and watchfulness lest irreparable harm be done to body and mind both in this generation and the next.
>
> Very young girls show almost immediate symptoms of lassitude, exhaustion, and impaired vitality under the influence of employment at night. A very similar impression was made by the appearance of large numbers of young boys who had been working at munitions for a long time on alternate night and day shifts.

In England the war exemptions to the factory laws have not included a lowering of the age limits for factory work. And the exemptions to the school-attendance laws permitted for agriculture and "light employment" are now bitterly regretted by the general education authority which has sanctioned them.

Among the New Decisions

With law must the land be built.—Danish Proverb.

Account stated — silence on receipt of bill. Silence following the receipt of a bill and demand for payment, it is held in the Washington case of United Iron Works v. Rathskeller Co. 161 Pac. 1197, does not constitute the bill an account stated.

Supplemental cases on the effect of retaining a statement of account to render it an account stated are appended to the foregoing decision in L.R.A.1917C, 445, the earlier authorities having been presented in 29 L.R.A. (N.S.) 334.

On the surface there may seem to be a conflict between the cases which state as a general rule that "rendition of an account and its retention by the party to whom sent, without objection within a reasonable time, give it the force and effect of a stated account," and cases like the foregoing which hold in effect that no conclusive presumption of such an assent to an account rendered as will convert it into an account stated arises from the fact of its retention. It has been pointed out that the presumption of assent thus arising is not only a rebuttable one, but also is not necessarily conclusive upon the triers of the fact; in other words, the presumption is one of fact, and not of law; hence the refusal of the court in the above case to treat the retention of an account rendered as implying, as a matter of law, a promise to pay the amount therein stated to be due. The apparent inconsistency of these cases with the so-called general rule is, therefore, due to the fact that the general rule does not bear upon its face the statement that it embodies a mere presumption of fact.

Apportionment — expenses — elimination of electrical interference on public highways — street railways — telephones. That the liability for the cost of eliminating electrical interference between high-voltage lines of street railways and power companies and the lines of telephone and telegraph companies occupying the public highways falls upon the company having the inferior right to use the highway is held in the Iowa case of Re Electrical Interference, P.U.R. 1917B, 800, the rights of electric railways and other companies of facilitating ordinary travel always being superior to those of a telephone or telegraph company irrespective of priority of occupancy, and the rights of companies not connected with public travel depending upon priority of occupancy.

Bank — joint deposit — effect. Money deposited by the owner in a bank to the credit of himself or another is held to belong upon his death to the latter, and not to his administrator, in the Virginia case of Parrish v. Merchants & M. Sav. Bank, 91 S. E. 135, annotated in L.R.A.1917C, 548.

Bank — stock — subscription secured by fraud — rescission. One defrauded into the purchase of stock of an insolvent bank by false representation of its officers as to its solvency may defeat, it is held in Smith v. Jones, 173 Ky. 776, 191 S. W. 500, L.R.A.1917C, 890, an action on the note given for the purchase price, by the bank commissioner, and have the transaction rescinded, if he has received no benefit from the stock, has

been guilty of no laches in failing to discover the true condition of the bank, or in seeking rescission after such discovery, and no additional indebtedness has been incurred by the bank on the faith of his note.

Benefit societies — injury in initiation — liability. The supreme body of a fraternal society which organizes subordinate lodges in order to secure members, and prescribes their ritualistic work, which is under the supervision of one of its own officers, is held liable for injury inflicted upon a candidate in initiating him into the order, in the Alabama case of Supreme Lodge, L. O. M. v. Kenny, 73 So. 519, accompanied by supplemental annotation in L.R.A.1917C, 469.

Bills and notes — note as collateral to worthless debt — consideration. A bank, it is held in Citizens' Trust Co. v. McDougald, 132 Tenn. 323, 178 S. W. 432, annotated in L.R.A.1917C, 840, cannot enforce a note secured by its cashier through friendship with the maker for the alleged accommodation of the bank, but in reality as collateral to a worthless note of an insolvent corporation in which the cashier was interested, although by statute a pre-existing debt may furnish a valuable consideration for a promissory note.

A claim may be worthless because of inability of the debtor to pay, or because it is legally unenforceable. There are some cases which hold, in accord with the foregoing decision, that a note given by a third person in payment of a claim that is worthless in the former sense is without consideration. It would seem, however, that if the note is taken in settlement of the worthless claim, the claim itself being surrendered, so that the creditor loses his right to enforce the same, there is a consideration for the note in the detriment to the promisee in surrendering what may at a future time acquire value. Where there is no legal foundation for the claim, or it is barred by some legal principle, such as the statute of limitations, it seems clear that there is no consideration for the note.

Bills and notes — transfer — love and affection. A transfer of a promissory note in consideration of love and affection is held to vest title in the transferee so as to enable him to enforce the note against the maker, in the Iowa case of Gooch v. Gooch, 160 N. W. 333, although the note was made on Sunday, if he had no knowledge of that fact and the note bore a secular date.

This decision is accompanied in L.R.A. 1917C, 582, by a note on the invalidity of a Sunday contract as affecting the right of an innocent third person to enforce it.

Bond — contractors — freight charges. A statutory bond given by a contractor for a public building, conditioned for the paying of all claims for labor and material, is held not to cover a claim for freight charges for transporting material to the building, in Wisconsin Brick Co. v. National Surety Co. 164 Wis. 585, 160 N. W. 1044, L.R.A.1917C, 912.

Carrier — concealed defect — duty. Potatoes in sacks were damaged from being loaded in cars in which the wood of the bottoms was permeated with salt. These cars were furnished by a prior carrier, and the potatoes transported in them over the line of such carrier and delivered to defendant, a connecting carrier, which continued the shipment to its destination on its line. The unsuitable character of the cars was not discoverable by defendant on any reasonable inspection. It is held in the Minnesota case of Higgins & Co. v. Chicago, B. & Q. R. Co. 161 N. W. 145, annotated in L.R.A. 1917C, 507, that the duty of defendant when it received the cars from the connecting carrier was to use due care, skill, and diligence in inspecting them; that it would be liable for a breach of such duty, but not for a defect which was unknown to it, and not discoverable by the exercise of due care, skill, and diligence.

Carrier — fender projecting from car — negligence. A street car company, it is held in the New Hampshire case of Guevin v. Manchester Street R. Co. 99 Atl. 298, L.R.A.1917C, 410, may be found negligent in leaving a fender projecting from the rear of the car, so that an intending passenger, who attempts to pass around the car to board it, falls over it, to his injury.

Carrier — provisions as to claim — waiver. That an interstate carrier cannot waive a provision in the bill of lading that a claim for injury to cattle must be made before they are removed from place of destination, or mingled with other stock, is held in the Montana case of Wall v. Northern P. R. Co. 161 Pac. 518, L.R.A.1917C, 433.

Carrier — storage charges on injured goods. A carrier, it is held in the North Carolina case of Holloman v. Southern R. Co. 90 S. E. 292, may charge for storage of goods alleged to have been injured *en route* from the time it declines to pay damages for the injury, since it then becomes the duty of the consignee to take the property and sue for his damages, if the goods are not so badly injured as to be worthless.

There are surprisingly few cases on the right of a railroad to charge storage or demurrage where the refusal to remove the goods is due to a dispute. These cases are gathered in the note appended to the foregoing decision in L.R.A.1917C, 416, and there is some apparent conflict among them.

Chattel mortgage — leasehold. That a mortgage of a leasehold for years is not within the statute providing for recording mortgages on personal property is held in Freedman v. Bloomberg, 225 Mass. 491, 114 N. E. 827, annotated in L.R.A.1917C, 628.

Contract — construction — waiver of claim for damages. Where a contract for construction of a building provides for forfeiture of rights in case of failure to make payments when due, taking possession of the building and paying the contract price in full is held not to waive a right of action for faulty construction, in the California case of Leonard v. Home Builders, 161 Pac. 1151, annotated in L.R.A.1917C, 322, especially where the payment is accompanied by written notice that damages will be claimed.

The cases generally support the doctrine that the owner's taking possession of a building, though with knowledge of defects therein, will not prevent his claiming damages for such defects against the building contractor.

Depreciation — accrued — machinery giving 100 per cent service. A deduction must be made for depreciation of locomotive engines after several years' use, in fixing their value for sale and security issue purposes, it is held in the Illinois case of Re Illinois Terminal R. Co. P.U.R.1917B, 494, although they are giving satisfactory service.

Discrimination — rates — municipal plants — low rates to manufacturers — public purpose. That a municipality operating a water plant cannot give a lower rate for water used for purely manufacturing purposes, to encourage the establishment of manufacturing plants within its limits, is held in the Missouri case of Civic League v. St. Louis Water Dept. P.U.R.1917B, 576, since the powers of the municipality must be employed alone for public purposes or objects, and aiding manufacturers is not such a public purpose.

It is also held in this case that the fact that lower water rates have been given to manufacturers than to other water users by a city during a long period of years does not constitute such a usage or custom as will be recognized by the law, since abuses of power and violations of right derive no sanction from time or custom.

Discrimination — service — railroads — privilege to maintain carriage stand and baggage transfer — right to grant. A railroad in Massachusetts may grant an exclusive privilege to maintain a public carriage stand and baggage transfer upon station premises, it is held in the Massachusetts case of Re Hayes, P.U.R.1917B, 923, the service being subject to regulation by the Commission, and others in the business not being denied access to the station.

Estoppel — filing rate schedules — denying jurisdiction of Commission. A utility is held not estopped to deny the jurisdiction of the Commission, in the Missouri case of Civic League v. St. Louis Water Dept. P.U.R.1917B, 576, after submitting to its jurisdiction by filing schedules of rates and requesting permission to cancel rates previously filed with the Commission.

Evidence — res ipsa loquitur — escape of cars. The mere fact that cars with proper brakes, which are placed for loading on a public siding having considerable grade, escape and run out onto the main track, to the injury of property belonging to the carrier, after it had become necessary for the shipper to move them to facilitate loading from where they were left by the carrier, is held, in the Utah case of Denver & R. G. R. Co. v. Ashton-Whyte-Skillicorn Co. 162 Pac. 83, L.R.A.1917C, 768, not to establish negligence under the maxim, *Res ipsa loquitur*, which will render the shipper liable for the injury, if the shipper is not shown to have been at work about them when the escape occurred.

A search has failed to disclose any cases as to the liability of a shipper or consignee for the escape of a car, other than those in which recovery has been sought by an employee injured while the car was being moved by the servants of the consignor or shipper, by reason of the defective condition of the brake. These cases may be found in notes in 14 L.R.A.(N.S.) 972, and 45 L.R.A.(N.S.) 707.

Gas — escape — explosion — liability. Where natural gas has been negligently permitted to escape, and it is ignited with a match by a person who is searching for the gas leak, and an explosion results, the consequent damages are held attributable to the explosion of the gas and to the negligence which permitted the gas to escape, in Maryland Casualty Co. v. Cherryvale Gas, L. & P. Co. 99 Kan. 563, 162 Pac. 313, L.R.A. 1917C, 487.

Highway — moving building — electric wires. The moving of buildings along streets is a recognized and proper use of them, and, in the absence of a statutory or municipal regulation as to the manner of moving the buildings or as to the raising or removal of wires placed by a railroad or other company across streets so that buildings may be moved along the streets, the expense of raising or removing the wires to allow a building to pass, where the interference is not unreasonable and the expense is inconsiderable, should be borne, it is held in Missouri P. R. Co. v. Sproul, 99 Kan. 608, 162 Pac. 293, by the railroad company rather than by the house mover.

Supplemental annotation on the right to interfere with the wires of a public service corporation in moving a building along the street accompanies the above decision in L.R.A.1917C, 772.

It may be observed that while the court in reaching its decision, that the expense of removing the wires of the public service corporation to allow a building to pass should be borne by the corporation, seems to take into consideration the fact that the expense is inconsiderable, the court in Edison Electric Light & P. Co. v. Blomquist (1911) 185 Fed. 615, says that whether the damage in a case of this kind is small or great does not seem to be the determining factor; that if the company can be compelled to move its wires at expense to itself it can be compelled to move its poles; and that if the moving of a house through the streets is a public use of the streets, which the court denies, then the company can be made to submit to any expense, however great.

Highway — passing street car — keeping to right. A municipal ordinance requiring vehicles on a highway to keep to the right and to pass on the left of other vehicles, which shall give way to the right, is held in the California case of Harris v. Johnson, 161 Pac. 1155, L.R.A.1917C, 477, not to apply to a standing street car, but a vehicle overtaking and attempting to pass it must pass to the right side of the road, although the space at the right of the car is temporarily blocked with traffic.

Highway — unguarded excavation — failure to keep near curb. That breach of a municipal ordinance requiring vehicles to keep as near the right-hand curb as possible will not prevent recovery by one whose vehicle is injured by falling into an unguarded excavation in the highway, although if the ordinance had been obeyed the excavation would have been passed in safety, is held in the Washington case of Rampon v. Washington Water Power Co. 162 Pac. 514, annotated in L.R.A.1917C, 998.

Homestead — exemption — family. That two sisters living together, if the other essential requisites concur, will constitute a "family," is held in the Oklahoma case of Union Trust Co. v. Cox, 155 Pac. 206, which is accompanied in L.R.A.1917C, 356, by a note as to what constitutes a "family" under homestead and exemption laws.

That an illegitimate child is not within the operation of a homestead exemption law defining a homesteader as one who has residing with him his minor child is held in Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 Pac. 1037, L.R.A.1917C, 353.

Homicide — manslaughter — collision with train. A locomotive engineer is held not guilty of manslaughter, in the North Carolina case of State v. Tankersley, 90 S. E. 781, annotated in L.R.A.1917C, 533, in colliding with a standing train and killing passengers thereon because he fails to obey a cautionary signal, if there was nothing about the signal to indicate that there was danger of collision or that life was in danger.

The position taken in this case, that a mere error in judgment, as distinguished from a negligent disregard of human life, will not render one criminally liable, is supported by Reg. v. Elliott (1889) 16 Cox, C. C. (Eng.) 710, where a conductor in charge of an excursion train which became stalled on an upgrade, who divided the train after taking precautions to prevent the rear section from running down the grade, which precautions, however, proved to be insufficient, and a collision followed in which a number of passengers were killed, was found not guilty of manslaughter, the court charging that, in order to convict, the jury must find that he was guilty of gross negligence or recklessly negligent conduct, and that for mere intellectual defect or mistake of judgment he could not be found guilty.

Husband and wife — liability for services of attorney. That a man is liable for the services of an attorney in instituting proceedings for divorce necessary for his wife's protection, even though she dismisses the proceedings before judgment, is held in the Iowa case of Maddy v. Prevulsky, 160 N. W. 762, L.R.A. 1917C, 335.

Injunction — strangers with knowledge. That persons with knowledge that one has sold a large quantity of tobacco to another who will suffer irreparable loss if he does not receive it may be enjoined from purchasing it from the vendor is held in Friedberg v. McClary, 173 Ky. 579, 191 S. W. 300, accompanied by supplemental annotation in L.R.A.1917C, 777.

Insurance — mutual benefit society — reduction of benefits. That a mutual benefit society contracting to pay sick benefits cannot, after a member has become sick and its obligation has accrued, amend its by-laws so as to reduce the amount for which it is to be liable, is held in the Maine case of Maheu v. L'Union Lafayette, 98 Atl. 821, accompanied with supplemental annotation in L.R.A.1917C, 625.

The earlier cases disclose an irreconcilable conflict on the right of a mutual benefit society to decrease benefits, with the numerical weight of authority in favor of the rule of law, which is supported by the later cases with little, if any, conflict, that the power reserved by a mutual benefit society to amend its laws does not authorize it to decrease the benefits to which a member is entitled by the terms of his contract.

Insurance — on profits — construction. In O'Brien v. North River Ins. Co. 128 C. C. A. 618, 212 Fed. 103, L.R.A. 1917C, 722, under a policy issued to a hotel keeper "on profits due assured by reason of advanced paid-up contract for use of rooms," a recovery was allowed for the whole amount upon the total destruction of the hotel by fire, although the rental value of the rooms contracted for when the policy was issued did not equal the amount specified; the policy being construed to cover profits from all business done by reason of the occupancy of the rooms, and it being held that the parties to such a contract might agree on a valuation in advance.

Two other cases have dealt with policies insuring hotel keepers against loss of profits by fire.

The destruction of a hotel to such an extent that business cannot be carried on until repairs have been made amounts to a "total loss" within a policy indemnifying against damage by fire to the "use and occupancy" of the hotel, which fixes the value, in case of a total loss, to a specified gross sum per day, and in the event of a partial loss prescribes certain daily rates for each room injured or destroyed, and a daily rate for loss of income from the restaurant or bar. It is not necessary that all the rooms shall have been injured or destroyed. Chatfield v. Ætna Ins. Co. (1902) 71 App. Div. 165, 75 N. Y. Supp. 620. Pacific Hotel Co. v. Michigan Commercial Ins. Co. (1909) 243 Ill. 110, 90 N. E. 244, under a policy issued to a lessee of a hotel insuring him against loss or damage by fire on the use and occupancy of the hotel, and containing a provision: "Loss, if any, to be computed from the day of the occurrence of any

fire to the time when the said building and equipment therein could, with any ordinary diligence and dispatch, be rebuilt, repaired, or replaced, and not limited to the day of expiration named in this policy,"—it was held that the insurer was liable only for loss of profits during the time within which the building and equipment could with ordinary diligence and despatch be rebuilt, repaired, and replaced, and did not extend over the entire unexpired term of the lease, where it was canceled by the lessor on account of the fire in accordance with the right reserved by the lease.

Insurance — statements as to relatives — warranties. Statements by an applicant for insurance as to the health and cause of death of his relatives will, it is held in the Iowa case of Teeple v. Fraternal Bankers' Reserve Soc. 161 N. W. 102, annotated in L.R.A.1917C, 858, if made in good faith, be treated as representations and not warranties, although the policy provides that every statement in the examination shall be held to be a strict warranty.

Judgment — injury to wife — bar to personal action. A judgment in favor of one suing for injury to himself, his wife, and his property, growing out of one tort, after he dismisses his claim for his own injury, is held a bar to a subsequent action based on such injury, in Smith v. Cincinnati, N. O. & T. P. R. Co. 136 Tenn. 282, 189 S. W. 367, annotated in L.R.A.1917C, 543, upon the question whether damages sustained on account of injuries to oneself and another at the same time constitute one or more than one cause of action.

Landlord and tenant — duty to repair common stairway. A lessee of an upper floor of a building is held in Tremont Theatre Amusement Co. v. Bruno, 225 Mass. 461, 114 N. E. 672, annotated in L.R.A.1917C, 387, not bound to repair injury to a common stairway done by his subtenant by covenants in his lease requiring him to keep the premises in repair, and forbidding him to sublet them, since the stairway being no part of the leased premises, the covenants do not apply to it.

Landlord and tenant — lease for saloon — effect of prohibition law. The adoption of a law prohibiting the sale of intoxicating liquors and making it unlawful to lease premises for such business is held in the Washington case of Stratford v. Seattle Brewing & Malting Co. 162 Pac. 31, annotated in L.R.A. 1917C, 931, to terminate a lease of premises which provides that they shall not be used for any other purpose than that of a saloon, although the lessee has been given permission to use the premises for a bootblack and cigar stand and restaurant purposes in addition to the saloon.

Libel — defamation of deceased person. A statute making every malicious publication which shall tend to expose the memory of one deceased to hatred, contempt, ridicule, or obloquy, a libel is held to apply in the Washington case of State v. Haffer, 162 Pac. 45, annotated in L.R.A.1917C, 610, to malicious defamation of an historical character who died before the birth of anyone living at the time of the publication.

As a matter of sound public policy, the malicious defamation of the memory of the dead is condemned as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through the criminal courts, but the law, as it exists in this country and England, does not contemplate the offense as causing any special damage to another, though related to the deceased, and therefore it cannot be made the basis of recovery in a civil action.

A criminal prosecution, on the other hand, will lie at common law for the libel of a deceased person if the intent of the libeler is to bring contempt on the family and posterity of the deceased, or to stir up hatred against them, or to excite them to a breach of the peace in vindication of the honor of the family.

Statutory changes in the common-law definition of criminal libel similar to that made by the statute under consideration in State v. Haffer have doubtless been made in many other jurisdictions.

License — acting without — wrongful refusal to grant. That one cannot avoid the statutory penalty for selling lightning rods without a license because a license to which he was entitled was refused him by the authorities, is held in the New Hampshire case of State v. Stevens, 99 Atl. 723, L.R.A.1917C, 528.

Marriage — of divorced Catholics. The performance of a ceremony by a Catholic priest in order that two di-

vorced Catholics may again lawfully live together as husband and wife, at which they intend to renew their marriage vows, is held sufficient to constitute a marriage, in Feehley v. Feehley, 129 Md. 565, 99 Atl. 663, annotated in L.R.A. 1917C, 1017, although, because of his belief that the marriage had not been dissolved, he only pronounced a blessing on their reunion.

Master and servant — eight-hour law — dressmaking shop. A shop kept by a woman on the second floor of her dwelling in which from five to ten girls are employed in making dresses is held to be a manufacturing establishment in Hotchkiss v. District of Columbia, 44 App. D. C. 73, L.R.A.1917C, 922, within the meaning of a statute forbidding the employment of females in such establishment more than eight hours per day.

Mechanics' lien — coal consumed in construction. That a railroad right of way is not subject to a mechanics' lien for coal consumed by machines used in its construction, under a statute giving a lien for materials furnished "for or in or about" a structure, is held in the Wisconsin case of Carnegie Fuel Co. v. Interstate Transfer R. Co. 160 N. W. 1046, L.R.A.1917C, 580.

Mortgage — assignee of equity — right to attack. Where one purchases land subject to a mortgage thereon, the land conveyed is effectually charged with the encumbrance to the same effect as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage on the land to secure it; and under such circumstances it is held in the Oklahoma case of United States Bond & Mortg. Co. v. Keahey, 155 Pac. 537, annotated in L.R.A.1917C, 829, that the purchaser will not be permitted to question the validity of the mortgage on the ground that it was void as to his grantor.

Mortgage — purchase of equity of redemption — liability. The mere purchase of the equity of redemption in mortgaged land is held not to make such purchaser liable personally for the payment of the mortgage debt, in Van Eman v. Mosing, 36 Okla. 555, 129 Pac. 2, annotated in L.R.A.1917C, 590.

Municipal corporation — negligence of employee — liability. Dynamite caps were used in blasting preparatory to installing water and sewer systems in the city's detention hospital while it was under construction. Employees of the city negligently failed to remove an unused sack of caps from the grounds on completion of the hospital. The plaintiff, a child of nine years, was taken to the hospital with his parents, who were afflicted with smallpox, and was allowed to play about the grounds. He found the caps and exploded one of them and was injured. The hospital was established, owned, and maintained by the city for the sole purpose of detaining and treating persons afflicted with smallpox.

It is held in Frost v. Topeka, 98 Kan. 636, 161 Pac. 936, L.R.A.1917C, 429, that the city is not liable in damages for the plaintiff's injury.

Negligence — contractor — surrender of property — liability to stranger. One who erects a banner across a public street for a political party, being paid for his services and terminating his connection with the job as soon as it is done except to place lights upon it under similar contract at a later date, is held not liable, in DuBois Electric Co. v. Fidelity Title & T. Co. 228 Fed. 129, L.R.A. 1917C, 907, for injury to a pedestrian on the highway by the fall of the banner during a wind storm, although the work was negligently done.

Physicians and surgeons — Christian Science treatment — religious tenet. Christian Science healing is held in People v. Cole, 219 N. Y. 98, 113 N. E. 790, annotated in L.R.A.1917C, 816, to be the practice of a religious tenet within the meaning of a statute forbidding, without license, anyone to hold himself out as being able to diagnose or treat any human disease, but providing that it shall not affect the practice of any religious tenet of any church.

Public service corporation — tender of bills — effect on right to discontinue service. Tender of the amount due by a consumer to a corporation furnishing electricity to the public before it enforces a provision of its contract, authorizing discontinuance of service for delay in paying bills, is held to prevent such enforcement, in Little Rock R. & Electric Co. v. Leader Co. 125 Ark. 418, 188 S. W. 1182, annotated in L.R.A.1917C, 374, although the time allowed by the contract for payment has elapsed.

Railroad — defective bell at crossing — injury — liability. A railroad company which maintains at a highway crossing a defective electric signal which will sound after a train has passed the crossing and its sounding for the approach of the train has ceased is held liable for injury, in Louisville & N. R. Co. v. Comley, 173 Ky. 469, 191 S. W. 96, to one attempting to drive across the track after the passage of the train, by the frightening of his horse by such sounding.

This seems to have been the only case to pass upon the question of the liability of a railroad company for the frightening of a horse by the "back-ringing" of an automatic electrical signal bell negligently maintained at a crossing.

However, a few other cases have involved the question of liability where the fright was caused by the operation or action of other forms of signaling devices, and these are collected in the note appended to the foregoing decision in L.R.A.1917C, 978.

Railroad — liability for noise. A railroad company is held not liable, in the Mississippi case of Dean v. Southern R. Co. 73 So. 55, L.R.A.1917C, 346, to an owner of property abutting on its track for mere noise caused by the operation of cars on a spur or service track, although it is so great as to interfere with rest and conversation, if the company is guilty of no negligence, and the noise is not sufficient to constitute a nuisance.

Rates — street railways — fare zones — factors. Inequality in fare zones on street railway lines radiating from a common center is held not conclusive that the rates are unreasonable, in the Massachusetts case of Re Grafton, P.U.R.1917B, 406, since the street car fares are not fixed strictly on a mileage basis, but are influenced by other factors, such as the location of centers of population, town and city boundary lines, and density of traffic.

Sale — animal — concealment of defect — rescission. Where the seller of a fine-looking mule refused to guarantee the soundness of the latter, but was well aware that it was afflicted with a hidden defect, not discoverable by ordinary observation, and where he untruthfully stated to the buyer that he did not know anything about the mule, and intentionally concealed the defect in the animal, the buyer, when he discovered he had been imposed upon, is held in Kitchen v. Long, 67 Fla. 72, 64 So. 429, annotated in L.R.A.1917C, 617, to have a right to rescind the trade, and recover his own property, traded for the diseased mule.

Sale — seed — warranty. One selling seed corn under warranty, with the offer to refund money if a test proves unsatisfactory, is held not liable for the loss of the crop in case the seed is planted without test and fails to grow, in the South Dakota case of Slinger v. Totten, 160 N. W. 1008, L.R.A.1917C, 539.

Sunday — cigar and candy stand — legality. The conducting on Sunday of a store where soft drinks and tobacco, canned goods, cheese, crackers, fruits, and candies are sold is held in McAfee v. Com. 173 Ky. 83, 190 S. W. 671, annotated in L.R.A.1917C, 377, to be within a statute providing that no work or business shall be done on the Sabbath day except work of necessity, although persons needing food might be supplied there.

The general rule seems to be that a restaurant may be kept open on Sunday for the sale of bread, butter, sandwiches, chocolate, coffee, and similar articles under a statute permitting works of necessity or charity on the Sabbath, such acts constituting works of necessity, as the courts maintain that the public, and especially the traveling public, require the keeping open of restaurants on Sunday in order that they may eat.

The point made in the foregoing case, that a keeper of a confectionery or small grocery store cannot be permitted to carry on his business in the regular and ordinary way on Sunday by reason of the fact that he incidentally sells eatables, such as sandwiches, is a rather novel one, and does not seem to have been raised in any other cases.

Trademark — groceteria. The owner of a number of self-serving grocery stores, who adopts and files a label containing the word "groceteria," which he places upon all goods sold therein, is held entitled, in the Washington case of Groceteria Stores Co. v. Tebbetts, 162 Pac. 54, annotated in L.R.A.1917C, 955, to the protection of a statute making it unlawful, when any person adopts and files any title, trademark, or term for the purpose of designating any goods as having been packed or put on sale by him, for another to imitate it.

Water — river out of channel — protection of land — liability. One who, to protect his land from being submerged by the water of a river which has left its channel, to which it cannot be restored, and which is gradually forming a lake upon lowland lying adajcent to it, deepens an outlet which the water has formed, is held not liable, in the California case of Jones v. California Development Co. 160 Pac. 823, annotated in L.R.A.1917C, 1021, if his act is not unreasonable under the circumstances, for injury caused to submerged land by the rapid withdrawal of the water standing on it because of the deepened outlet.

As practical as the point here presented seems to be, no additional case has been found which squarely passes upon the right of a private land owner to deepen a natural channel so as to protect against an overflow therefrom upon and the flooding of his land, by so increasing the capacity of the waterway that it will carry waters which otherwise would so overflow.

Will — devise to unascertained person. A devise to either of testator's children who will support an incompetent for life, of a remainder at his death, is held void for uncertainty, in the Alabama case of Summers v. Summers, 73 So. 401, although at the time for distribution the one who fulfilled the conditions is known.

This decision as stated in the note accompanying it in L.R.A.1917C, 597, is not in accord with other cases involving a similar situation. It is perfectly well settled that a legatee or devisee may be described with reference to some extrinsic circumstances; and *"id certum est quod certum reddi potest."* The true rule seems to be that it is sufficient if doubt as to the identity of the beneficiary is resolved at the time the gift takes effect.

Recent English Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Animals — duty of owner to keep on own premises — effect of failure of person sustaining damage to keep fence in repair. That the principle that owners of animals must keep them upon their land at their peril applies, notwithstanding the presence of such animals on the plaintiff's premises was due to his failure to maintain a division fence which, by an agreement between himself and the common landlord of the parties, he was bound to keep in repair, is held in Holgate v. Bleazard [1917] 1 K. B. 443.

Insurance — goods consigned abroad on "sale or return" — outbreak of war with country of consignee — rights of assured. The case of Moore v. Evans [1916] 1 K. B. 479, 85 L. J. K. B. N. S. 802, [1916] W. N. 25, 32 Times L. R. 224, heretofore noted in these columns as holding that one who has consigned jewelry on a memorandum, according to a well-known custom of the jewelry trade, to merchants in Germany who, upon the breaking out of war, were prevented by law from either purchasing the jewelry or returning it, is entitled to claim a total loss under a policy covering "loss of, or damage or misfortune to, the property arising from any cause whatsoever," has been reversed by the court of appeal in [1917] 1 K. B. 458, on the ground that the policy was one on goods, and not on an adventure, and that it did not appear that the goods were not ultimately recoverable.

Landlord and tenant — covenant by lessee to repair upon being furnished necessary material — lessor's obligation to furnish. That a stipulation in a lease whereby the lessee covenanted with the lessor that he would "from time to time during the said term at his own cost (being allowed all necessary materials for this purpose, to be previously approved in writing by the lessor, and carting such materials free of cost a distance not exceeding 5 miles from the farm), when and so often as need shall require, well and substantially repair and maintain the farmhouse, etc., to the said premises belonging," does not imply an obligation on the part of the lessor to furnish materials for repairs when needed, is held by a divided court in Westacott v. Hahn [1917] 1 K. B. 605.

Lien — conditional sale — contract to keep in repair — lien as against seller for cost of repairs. One who, at the instance of the purchaser of a motor car under a hire-purchase agreement binding him to keep the car in good repair and working condition, has executed repairs thereon, may claim a lien on the car for the cost of the repairs as against the seller, who, before the repairs were completed, elected to terminate the agreement in consequence of the purchaser's default, and demanded possession of the car from the repairers. Green v. All Motors [1917] 1 K. B. 25.

Negligence — unbroken colt loose on highway at night — injury to person using highway. That, in view of the known propensity of young, unbroken colts when startled to rush about and to kick, it is negligence to conduct such a colt along the highway at night by leading a mare which it was accustomed to follow, without securing it in any way, so as to render its owner liable where the colt, being startled by the light on a bicycle coming from the opposite direction, suddenly ran across the road and collided with and injured the cyclist, is held in Turner v. Coates [1917] 1 K. B. 670.

Sales — sold note — condition — assent of buyer. Where a seller of goods hands to the buyer a sold note which the buyer accepts as being the contractual document, it is no part of the seller's duty to call the buyer's attention to the terms of the note, and the buyer is bound by any conditions contained in the note, although he may not have read them, or have known that the note contained any conditions, unless the conditions are printed in such a manner or are in such a position in the note as to mislead a reasonably careful business man; in which case the note must be read as if it did not contain the conditions. Roe v. R. A. Naylor [1917] 1 K. B. 712.

Vendor and purchaser — specific performance — effect of purchaser's knowledge of incurable defects in title. Although it is an implied term of a contract for the purchase of real property in which nothing is said as to the character of the title that a good title shall be furnished, it is competent to show, in an action against the purchaser to compel specific performance, that he knew, when he entered into the contract, of the existence of incurable defects in the title, according to a decision of the English court of appeal in Alderdale Estate Co. v. McGrory [1917] 1 Ch. 414, 86 L. J. Ch. N. S. 368.

Workmen's compensation — accident from extraneous cause as one "arising out of" employment. That an injury sustained by an employee while working in a shed belonging to her employer which was crushed by the fall of a wall which was being built on the property of an adjoining proprietor was one "arising out of" the employment, is held by the House of Lords in Thom v. Sinclair [1917] A. C. 127, 86 L. J. P. C. N. S. 102, in which the workmen's compensation cases involving injury from extraneous causes to persons whose presence in the particular place where the injury occurred was occasioned by their employment are discussed.

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New Books and Periodicals

Men disparage not antiquity who prudently exalt new inquiries.—Sir Thomas Browne.

Ruling Case Law. Vol. 17. Edited by William M. McKinney and Burdett A. Rich. (Edward Thompson Company, Northport, N. Y.; Bancroft-Whitney Company, San Francisco, Cal.; The Lawyers Co-operative Publishing Company, Rochester, N. Y.)

This volume, uniform in appearance with those previously issued in this series, contains 1,241 pages of text. It comprises, in alphabetical order, the legal titles from Larceny to Lotteries, both inclusive. Important subjects treated in this volume are Levy and Seizure, Libel and Slander, Licenses, Liens, Life Estates, Limitation of Actions, Lis Pendens, Logs and Timber, Lost Papers and Records, and Lost Property.

The merit of this series is making it increasingly popular with the legal profession. Courts have approved it by citing it in their opinions. The issuance of each new volume, covering additional ground, increases the serviceableness of the set.

"The Structure of an Effective Public Speech." By H. B. Bradbury, of the New York Bar. (The Sherwood Company, 19 John St., New York.) $1.00 postpaid.

This is a pocket volume designed for the use of those who desire to become proficient in the art of public speaking. It does not purport to be a complete guide to the subject. The structure only of public addresses has been considered.

There are chapters treating of the divisions of an oration,—of the Introduction, Statement of Facts, Argument, Refutation, Conclusion, etc., with illustrative models.

The work is practical rather than theoretical, and is the result of many years of close observation of public speakers.

"The Constitutional Review." Henry Campbell Black, Editor. (717 Colorado Bldg., Washington, D. C.) Vol. I. No. 1, April, 1917. $1.00 per year.

The Executive Committee of the National Association for Constitutional Government has issued, under the editorship of the well-known legal writer, Henry Campbell Black, the initial number of a magazine devoted to the interests of the association, and which is named, "The Constitutional Review." The leading articles presented in this number are: "Representative Government," by David Jayne Hill; "Shall We Change Our Form of Government," by N. C. Young; and "In Defense of the Judiciary," by Dr. Black.

Leading features of the number issued July 1st, are a critical study of the new Constitution of Mexico, and an account of Russia's struggle for freedom and constitutional government.

The National Association for Constitutional Government is a nonpartisan, patriotic society, formed for the purpose of advocating the maintenance of constitutional government in the United States.

"Municipal Manual." Prepared by John R. Meredith and William B. Wilkinson. Edited by Sir William Ralph Meredith, Kt., Chief Justice of Ontario. (Canada Law Book Co., Toronto.)

A remarkable extension of the powers of municipalities in the Dominion of Canada has been brought to notice by the new Municipal Manual just published by the Canada Law Book Company of Toronto. This manual was prepared by John Redman Meredith and William Bruce Wilkinson of Osgoode Hall, Toronto, but the Chief Justice of Ontario, Sir William Ralph Meredith, Kt., who is a recognized authority on municipal law, has edited this work with most thorough supervision.

The law of each province is treated separately and co-ordinated with the text, making it cover the whole subject of Canadian Municipal Law as interpreted by Canadian and English decisions. Extraordinary powers are given to the towns and municipalities in controlling the necessities of life, the social conditions of the wage-earning class, and vital public service questions on which urban communities are dependent.

Under the Municipal Act, municipalities may borrow money for buying and storing fuel and articles of food for the purpose of selling to dealers and residents in the municipality, and acquire land, buildings, etc., to use in such purposes. By-laws of this kind require a two-thirds vote of the council, but do not have to be assented to by the electors.

Under the Patriotic Grants Act, municipalities may provide funds for the Red Cross, Belgium relief, hospitals, military equipment, insurance on the lives of resident officers and men in military service for the benefit of their families, and also for many other specified purposes of similar character, including the care of the dependents of men who have died in military service.

Demands for home rule in our own cities have thus far been rather modest compared with these measures, which the Canadians have already carried into effect. It is obvious that some of them have been adopted as war measures. It will be interesting to see how they result.

Recent Articles of Interest to Lawyers

Aliens.

"Alien Enemies as Litigants."—3 Virginia Law Register, 93.

"Status of Resident Aliens Who Are Subjects or Citizens of Nations at War with the United States."—3 Virginia Law Register, 81.

Attorneys.

"Choice of Location and Establishment of a Law Practice."—1 Marquette Law Review, 159.

"Looking Forward." (Part which lawyers may play in promoting international harmony.)—30 Harvard Law Review, 792.

"Nova Methodus Discendæ Docendæque Jurisprudentiæ."—30 Harvard Law Review, 812.

"The Lawyer and the Public."—10 Maine Law Review, 189.

"The Legal Ethics Clinic of the New York County Lawyers' Association."—12 Illinois Law Review, 98.

Banks.

"What the Federal Reserve System Has Done."—7 The American Economic Review, 269.

Buildings.

"Minnesota Residence District Act of 1915."—1 Minnesota Law Review, 487.

Carriers.

"Duty of Carrier as to Safety and Convenience of Its Stations and Approaches."—84 Central Law Journal, 399.

"Federal Uniform Bills of Lading Act."—1 Minnesota Law Review, 493.

"Railroad Equipment Obligations."—7 The American Economic Review, 353.

Conflict of Laws.

"Conflicts of Opinion in Insurance Laws."—5 Georgetown Law Journal, 1.

"Surety Paying Debt Not Barred Where Payable, but Barred Where Suit Is for Contribution."—84 Central Law Journal, 421.

Conscription.

"Lessons from the Civil War Conscription Acts."—12 Illinois Law Review, 77.

Constitutional Law.

"Covert Legislation and the Constitution."—30 Harvard Law Review, 801.

"Drifting from the Constitution."—10 The Lawyer and Banker, 156.

"Enemy Sympathizers Not Protected by Federal Constitution."—24 Case and Comment, 148.

"The New English War Cabinet as a Constitutional Experiment."—30 Harvard Law Review, 781.

"Woman Suffrage in Parliament: A Test of Cabinet Autocracy." (Is the Cabinet or the House of Commons the Supreme Authority?)—11 The American Political Science Review, 284.

Contracts.

"Promises to One of Performance to Another."—24 Case and Comment, 134.

Counties.

"Governmental Function in Wisconsin."—1 Marquette Law Review, 166.

Credit.

"Lending Our Financial Machinery to Latin-America."—11 The American Political Science Review, 239.

Criminal Law.

"Necessity for Arraignment and Plea in Criminal Cases."—5 Georgetown Law Journal, 12.

Declaration of Independence.

"The Declaration of Independence."—24 Case and Comment, 87.

Distribution.

"Marketing Functions and Mercantile Organization."—7 The American Economic Review, 306.

Fourth of July.

"The Fourth of July in the Far East."—24 Case and Comment, 99.

Insurance.

"Conflicts of Opinion in Insurance Laws."—5 Georgetown Law Journal, 1.

Law and Jurisprudence.

"The Philosophy of State Legislation."—12 Illinois Law Review, 63.

"The Reign of Law."—84 Central Law Journal, 380.

License.

"A Federal License and Commercial Tax."—34 The Banking Law Journal, 363.

Master and Servant.

"Oregon Minimum Wage Cases."—1 Minnesota Law Review, 471.

Mayflower Compact.

"The Mayflower Compact."—24 Case and Comment, 93.

Mechanics' Lien.

"When Do Stipulations in Building Con-

tracts Preclude the Builders' Lien?"—84 Central Law Journal, 416.

Monopoly.

"Business Competition and the Law."—24 Case and Comment, 111.

"'Exclusive-Dealer' Agreements."—24 Case and Comment, 103.

"Price Maintenance."—24 Case and Comment, 125.

Monroe Doctrine.

"The Monroe Doctrine and the Government of Chile."—11 The American Political Science Review, 231.

Municipal Corporations.

"Governmental Function in Wisconsin."—1 Marquette Law Review, 166.

Pan-America.

"Pan-American Co-operation in Pan-American Affairs."—11 The American Political Science Review, 217.

Parties.

"Bringing in Additional Parties."—12 Bench and Bar, 6.

Partition.

"Judicial Partition of Water Powers."—24 Case and Comment, 115.

Prices.

"Determinants of Lumber Prices."—7 The American Economic Review, 289.

"Open Price Associations."—7 The American Economic Review, 331.

Principal and Surety.

"Surety Paying Debt Not Barred Where Payable, but Barred Where Suit Is for Contribution."—84 Central Law Journal, 421.

Real Property.

"Sources of Land Title in Bangor."—10 Maine Law Review, 201.

Records and Recording Laws.

"The Torrens Law Construed."—10 The Lawyer and Banker, 167.

State.

"Governmental Function in Wisconsin."—1 Marquette Law Review, 166.

Treaties.

"Treaties and State Laws."—10 The Lawyer and Banker, 181.

Wages.

"Real Wages in Recent Years."—7 The American Economic Review, 319.

War.

"Alien Enemies as Litigants."—3 Virginia Law Register, 93.

"Status of Resident Aliens Who Are Subjects or Citizens of Nations at War with the United States."—3 Virginia Law Register, 81.

"The New English War Cabinet as a Constitutional Experiment."—30 Harvard Law Review, 781.

Waters.

"Judicial Partition of Water Powers."—24 Case and Comment, 115.

Witchcraft.

"The Only Witchcraft Cases Ever Tried in the South."—24 Case and Comment, 141.

Woman Suffrage.

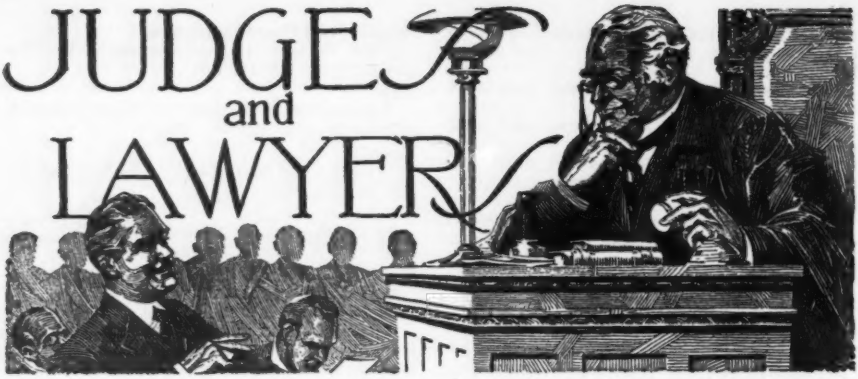
"Woman Suffrage in Parliament: A Test of Cabinet Autocracy." (Is the Cabinet or the House of Commons the supreme authority?)—11 The American Political Science Review, 284.

Workmen's Compensation.

"British Workmen's Compensation Law-Procedure."—84 Central Law Journal, 398.

The Study of Books

We enter our studies, and enjoy a society which we alone can bring together. We raise no jealousy by conversing with one in preference to another; we give no offense to the most illustrious by questioning him as long as we will, and leaving him as abruptly. Diversity of opinion raises no tumult in our presence; each interlocutor stands before us, speaks or is silent, and we adjourn or decide the business at our leisure.—Landor.



A Record of Bench and Bar

A Lawyer Who Is Campaigning for the Conservation of the Nation's Resources

BY EDGAR WHITE

JUDGE ALBERT D. NORTONI, of St. Louis, who, at a convention held there in April, wrote the war prohibition resolution there adopted for submission to Congress, is an interesting personality. Since becoming an associate justice of the St. Louis court of appeals by virtue of an overwhelming vote in his favor in 1904, he has been very much in the public eye, both state and nationally. He resigned from the bench in 1916, and is now engaged in the general practice of law in St. Louis. But a large part of his time this summer will be devoted to the campaign for national prohibition and the conservation of the nation's resources in men and material.

An attempt to enumerate the many honorary positions Judge Nortoni has held in his native state would be like giving a list of the various bodies organized for the public weal. His wonderful capacity for work, and his willingness to accept almost any task shouldered on him, from legal adviser for a village council to a nomination for governor, has kept him fairly busy, and made him a host of ardent friends.

The Judge was born in a Macon county village about fifty years ago, and he has been on the jump from the day he saw the light creep over the cottonwood trees on the Chariton bottoms. His marvelous capacity for doing things right is not a gift from the gods, but because of infinite pains and industry. He inherited a strong, vigorous body, and he has taxed it to the limit to keep up with his mental activity. That inheritance was all the capital Judge Nortoni had when he started out to read law along in the 80's. To meet his modest expenses he made a bargain with a farmer friend to haul wood to town, and sell it at public vend,—the proceeds of one load going to the farmer, and of the next load to the student, and so on. That was at Linneus, where he was reading law in Major A. W. Mullins's office. A girl there, who thought the dark-eyed young man good looking, but a bit queer, once said of him:

"He talks law and civil government to girls! But he can recite poetry, too!"

People passing Major Mullins's ground-floor offices late at night would frequently see Nortoni walking up and down, addressing shadowy jurymen. They laughed and thought it freakish. Not many years later they heard him on the platform and voted for him for gov-

ernor. Then they saw why he had been walking the floor and "spouting."

His studies finished, Nortoni went back to his native town of New Cambria, built him a little brick law office and hung out his shingle as lawyer, notary public, insurance agent, and the like, so as to "catch 'em coming and going."

The first few years the business that fell into the young lawyer's net was mostly writing insurance and contracts, and scrapping over accounts and replevin suits in justices' courts.

But he read and read and read! Nothing seemed to get away from him. On the news of the world he was by far the best posted man in town. This incident shows how minutely he went through the papers:

An old man was arrested for beating his wife. Application was made to have him put under a peace bond. Thinking the case too small for him to bother with, the county attorney, knowing Nortoni was always glad to get any kind of case, asked the young lawyer to appear for the state at the trial. An attorney from Macon,—a man who had quite a reputation as a "pleader,"—went over to defend the old man. Curled in front of the defendant was a yellow dog. Vest's "Eulogy of the Dog" had recently appeared in some paper. It was not nearly so familiar then as it has since become. When the orator from Macon saw the yellow dog at the old man's feet he recalled Senator Vest's speech, and was alive to the opportunity for an effective appeal to the jury.

"Gentlemen," and he indicated the mongrel, "when all other friends desert, the dog remains. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying to guard against danger to fight against his enemies; and when the last scene of all comes, and when death takes the master in its embrace, and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by his graveside will the noble dog be found, his head between his paws, his eyes sad, but open in alert watchfulness, faithful and true even in death!"

So well was it delivered some of the jurymen cried. All looked toward the aged defendant sympathetically. It is said that even the dog's eyes were moist. It was pretty clear the defendant's lawyer had things coming his way; but Nortoni had the wind-up, and during the noon recess he hunted up a paper which had the dog speech in it. This he produced and read to the jury in the afternoon, word for word as opposing counsel recited, and which the jury thought was original.

"You see, gentlemen of the jury," said Nortoni, "Senator Vest was talking about another dog altogether. He never heard of this yellow cur!"

The jury found the defendant guilty, put him under a peace bond of $1,000, in default of which he had to go to jail.

One warm night in September, 1901,—the "dry year,"—Nortoni and some others were sitting in chairs in front of the little brick law office. All were gloomily discussing the drought and the failure of crops. Presently some one called attention to a light in the west. There had been many fires that hot summer, but soon this one flared up to large proportions. All sorts of guesses were made. Nortoni telephoned over the western line, and the operator told him the town of Ethel was burning up. The young lawyer carried some insurance on the buildings there. Within an hour he was in the burning village, helping save goods and doing what he could. When the flames had burned themselves out there was a damage of $75,000 to stores and other buildings.

Nortoni investigated the cause of the fire, and decided it had been set out by a spark from a Santa Fe engine. A delegation of citizens called on him as he was preparing to leave. He was the only lawyer in the place. They asked him to remain over until next day, and then they filed with him claims aggregating $50,000, with instructions to sue the road if payment was declined.

Then it was that Nortoni's long and arduous toil and self-denial began to bear fruit. The great railroad system sent three veteran lawyers to La Plata to try its case. The people of Ethel staked everything they had on their village lawyer. They had no money to pay a high-

HON. ALBERT D. NORTONI.

power man from a city. If they lost the case they lost their all, because insurance companies would not carry stocks in frame buildings.

It was the biggest piece of litigation that had developed in northern Missouri for many years. Young Nortoni knew that it would eventually reach the Federal court, and he saw possibilities beyond the financial reward.

The case was first called for trial in the state court at La Plata in the fall of 1902. There for a day the three experienced attorneys for the railroad assaulted the pleadings of the young lawyer, who responded in an argument of less than half an hour. The court sustained the petition, and the trial began. For eight days and nights it ran, the attorneys for the railroad working by shifts, the young lawyer for the plaintiffs without legal aid. The road summoned its mechanics and boiler makers from up and down the line to prove that by no possible means could a spark of the size described in plaintiffs' evidence escape through the locomotive arrester and set on fire a building 170 feet away.

The result at La Plata was a hung jury, two of the members being for the defendant. Then by agreement the action was taken to the Federal court at Hannibal, the decision in one case to settle the liability in all.

The one great issue in the case was as to whether the sparks from the California Limited—the crack passenger train of the defendant—could have started the fire within the four minutes it stopped at the Ethel tank to take water. It was admitted that the fire was seen above the roof of the restaurant as the train was leaving town.

Experts for the road testified that sparks from the engine could not possibly develop the fire by the time the train was leaving.

So four minutes became a highly significant feature in a case involving over $50,000.

The issues thus made up, the attorneys went to the jury with their arguments. The railroad's lawyers talked lightly of what could be done in four minutes. They said it was barely time for a man to drink a glass of soda water, or to walk around the block.

Nortoni replied for the plaintiffs that it all depended upon how you looked at it; battles had been won and lost by the way commanders used a few moments of time at a critical period.

"But there is an absolute way to determine just how long four minutes are and what might be done in that brief time," said Nortoni, taking out his watch. "I will ask the foreman of the Jury, Mr. L. S. Harlan, to take this watch and to give us the signal when he starts and when the four minutes are up."

The foreman took the watch in his hand, noted where the minute hand was, and said: "Ready!"

The other jurymen leaned over and looked at the watch. Then they got tired and settled back in their seats. Mr. Harlan lowered his hand and rested it on his knee. The court room became oppressively quiet. For a while the plaintiffs' lawyer stood by a table and then sat down in a chair. A deputy marshal put his head in the door to see what the matter was, discovered that everybody was silent, and then came in to witness the outcome of the curious scene. The judge shifted to a more comfortable position in his high-backed chair and yawned. Every man in the room who owned a watch had opened it and was studying its face. The young pleader was sacrificing four minutes of his time for argument, but he looked at it as the most convincing argument he might make.

Finally, with a look of relief, Foreman Harlan snapped the watch and handed it back to Nortoni.

"Time's up," he said.

The spectators sighed with relief, as people sometimes do after witnessing a perilous performance on a high wire. Only four minutes it was, and yet every man in that room, had he not consulted his watch, would have declared that it was fifteen. It seemed long enough to set out a dozen fires, and that conviction was burned so deeply into the jurors' minds that they promptly found for the plaintiffs for the full amount sued for.

Associated at that trial with young Nortoni was P. D. Dyer, who afterward

was made judge of the Federal bench for the eastern district of Missouri.

With the 20 per cent Nortoni received out of the big verdict he purchased a fine law library and moved to St. Louis, where he was appointed assistant United States attorney for the eastern district of Missouri. While holding that position he unearthed and prosecuted the naturalization fraud cases in St. Louis with such vigor and success that his work was commented upon throughout the country.

In 1904 Nortoni was elected judge of the St. Louis court of appeals by a plurality of nearly 10,000 over his principal opponent. The position paid $6,000 a year.

"As a boy I heard a great deal about that royal personage known as opportunity," remarked Judge Nortoni, "and I waited for him several years, then concluded he had passed me by, and went out in search of him. It is no trouble to find him if you go out after him. What I mean to say is that we make our opportunities. Not once in a thousand years do they come unsought.

"This is a good old world when you once make up your mind that it is, and that the great mass of the people want to help you as long as you show them that you are ambitious to do something. The people are always right. They are good, and they are patriotic. But you must study them and prove worthy of their confidence if you would have their good will and support. Human nature is just the same in a little justice shop on a creek in the back woods as it is in the highest court in the land. You strike the fundamental of right living in the Squire's primitive tribunal, and you will find that it stands you in excellent hand wherever men are, be they of high or low degree."

Senator Joseph B. Foraker

A Militant Ohio Statesman

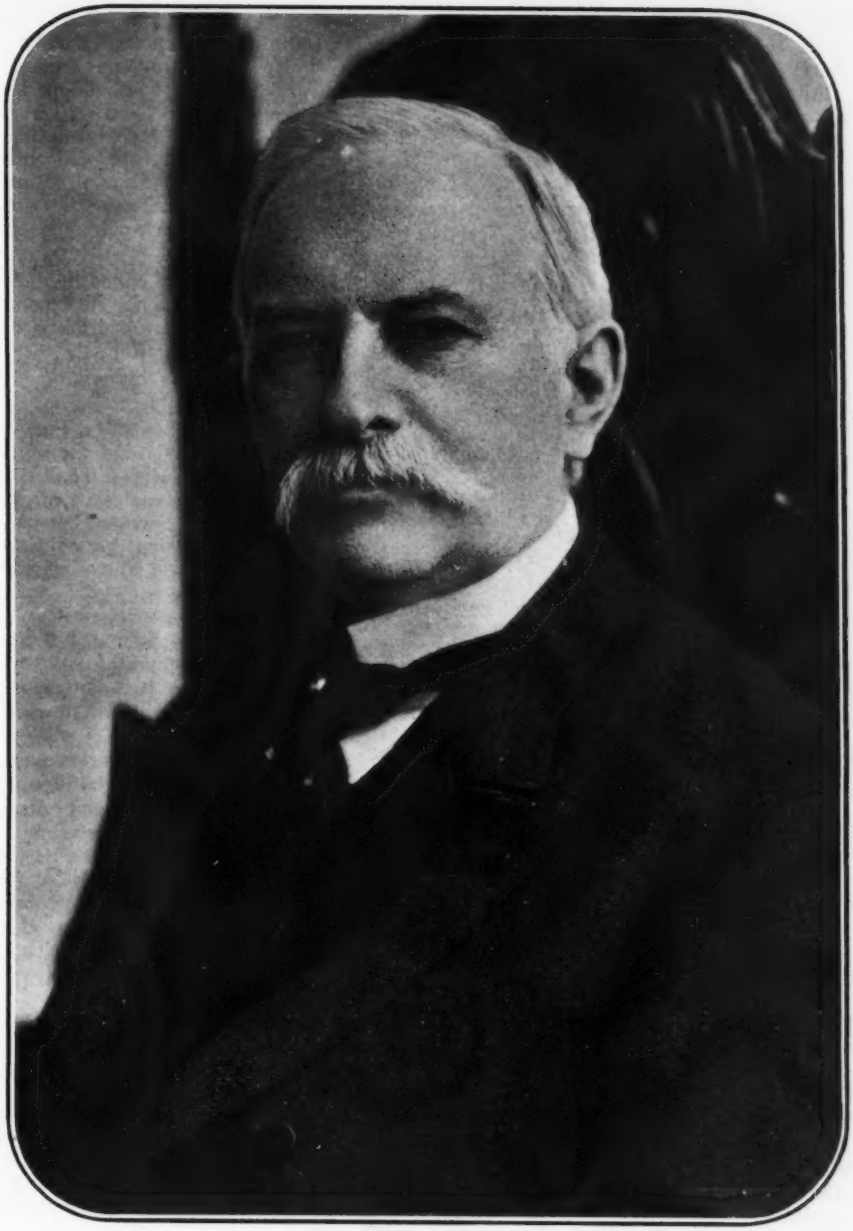
JOSEPH B. FORAKER, lawyer, orator, soldier, and statesman, died in Cincinnati on May 10. He had been governor of Ohio for two terms, and the state's representative in the United States Senate for twelve years.

He was born on a farm near Rainsboro, Highland county, Ohio, July 5, 1846. He enlisted on July 14, 1862, at the age of sixteen, as a private in Company A, Eighty-ninth Regiment, Ohio Volunteer Infantry, with which he served until the close of the Civil War. It was said of him later that he had always been a fighter. In three years after his enlistment he was brevet captain. He served all through the Atlanta campaign, and when he was mustered out at the close of the war he was an aide-de-camp on the staff of General Slocum.

Immediately after the war he entered Cornell University and was graduated there in the class of '69. During the same year he was admitted to the bar, and in October, 1869, opened a law office in Cincinnati. After ten years of practice he was elected to the bench of the superior court of Cincinnati. Illness caused him to resign from the bench in 1882.

As his health improved, Mr. Foraker earnestly went in for state politics. In 1883 the Republicans nominated him for the office of governor of Ohio. He was defeated by one of his close friends, George Hoadley, who was elected by the Democrats. Two years later, with Governor Hoadley again his opponent, Mr. Foraker became governor of Ohio. He was re-elected in 1887, but when he ran for the fourth time, in 1889, he was beaten by James E. Campbell.

Undaunted by his last defeat, he began to look toward the United States Senate. He had fought hard at the Republican National Convention of 1884 to get the party to nominate John Sherman for the Presidency instead of Blaine, but after his gubernatorial defeat in 1889 he turned against Sherman to the extent of becoming Sherman's opponent for the United States Senate. Foraker was defeated, but he kept on fighting, and in



HON. JOSEPH B. FORAKER.

1896 was elected United States Senator from his state, succeeding Calvin S. Brice.

Almost immediately Senator Foraker became a Senatorial power at Washington.

Mr. Foraker won considerable prestige before the death of McKinley by his prominence as a defender of the cause of Cuba against Spain. He drafted what became the first organic law of Porto Rico, and he was active in the negotiations that resulted in the Hay-Pauncefote treaty, which permitted the building of the Panama canal.

In the Senate, Mr. Foraker was long a member of the Interstate Commerce committee. In that capacity he attended the protracted hearings incident to the framing of the railroad rate bill, and afterward took a conspicuous part in shaping the legislation. Prior to that he assisted in drafting the Elkins Anti-rebate Law, under which the Federal government has made so many successful prosecutions against railroads and shippers that were giving or receiving discriminatory treatment. Foraker contended stubbornly and brilliantly that the rate bill was a superfluous piece of legislation.

His self-assumed task of seeking to prevent the passage of the rate bill was as stupendous as his subsequent effort to secure what he considered fair and just treatment for the negro soldiers who were charged with the shooting up of Brownsville, Texas. As a member of the military committee which conducted the investigation of the affray, the onus of the inquisition actually fell upon his shoulders, since it was he who instigated it by offering the appropriate resolution. For nearly two years he devoted time and work to this case. Although he lost the fight for their reinstatement, he won recognition from all sides for his tireless energy on their behalf.

His term in the Senate ended in 1909. He resumed his law practice in Cincinnati then, and in late years had taken almost no part in national affairs.

In 1916 he wrote his history of his career, "Notes of a Busy Life."

In the preface to his book, Mr. Foraker said: "I was a candidate at the Ohio primary election, held August 11, 1914, for nomination as the Republican candidate for United States Senator, but was defeated. I recognized that my political career was ended." And in the closing chapter of the book he said: "Toward those with whom I was associated in public life and those who followed them, whether friends or enemies, I have no ill feeling of any kind. It is not necessary I should have any ill will toward anybody. 'Vengeance is mine, I will repay, saith the Lord.' He has been repaying. He is everlasting, and will continue to repay as truth and justice may require."

Belva A. Lockwood

Peace Worker, Lawyer, Philanthropist, Suffragist

BELVA A. LOCKWOOD, the first woman admitted to practice before the Supreme Court, a pioneer in the woman suffrage movement, and the only woman who ever was a candidate for President of the United States, died in Washington, District of Columbia, on May 19, after a long illness, aged eighty-six years.

Ever since the Civil War Mrs. Lockwood had been a central figure in efforts to get equal suffrage, economic and professional rights for women. She won for women the right to practise before the Supreme Court of the United States. She worked zealously for more than fifty years to open the doors of higher educational institutions to women. The home and office at 619 F street, where she lived and practised law for nearly forty years, was a center for gatherings of leading figures in women's movements of all sorts.

For more than sixty years Mrs. Lockwood was an active worker in the cause of equal rights for the sexes. She her-

self liked to tell how she became one of the first women in this country to fight for her sex. A widow at twenty-four years of age, with a child, she was teaching school in her native town, Royalton, New York, at a salary of only $3 a week. Men teachers, doing the same work, were getting twice as much, or more. "I kicked to the school trustees," she said, "I went to the wife of the Methodist minister. The answer I got opened my eyes and raised my dander. She said: 'I can't help you; you cannot help yourself, for it is the way of the world.'" The then apparent hopelessness of woman's cause so aroused her that she fought for the rest of her life against the exclusion of women from rights which men enjoyed. She fortified herself with a collegiate education at Genesee College, in the days when higher education was rare among women, and for successive periods was preceptress of seminaries at Lockport, Gainsville, and Oswego, New York.

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BELVA A. LOCKWOOD.

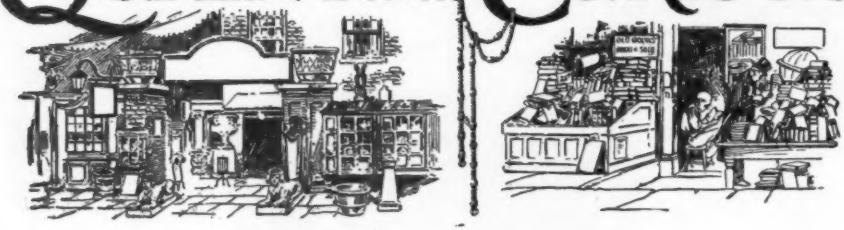
She graduated from the National University of Law and after spirited controversy was admitted to practise before the supreme court of the District of Columbia.

"I never stopped fighting," she said. "My cause was the cause of thousands of women. I drew up a bill admitting women to practice at the bar of the United States Supreme Court, and I had it passed."

This victory made her widely acclaimed. She herself was the first woman to take advantage of the new law, and at the age of forty-nine was admitted to the highest court in the land. She won several notable legal battles, including the case of the Eastern Cherokees against the United States, in which she secured a settlement of $5,000,000 for the Indians. During President Garfield's administration she made an unsuccessful application for the Brazilian mission. The most striking incident of her career then came, in 1884, with nomination by the Equal Rights party of the Pacific Slope as a candidate for the presidency of the United States. Vain as the action was, it was a unique distinction. The nomination was renewed by the same party meeting in Iowa four years later.

In 1889 she was a delegate of the Universal Peace Union to the International Peace Congress in Paris, and again in 1890 to the congress at London, where she presented papers on arbitration and disarmament. She lectured throughout the country, and until her last days maintained her law office in Washington.

QUAINT and CURIOUS



A sheaf of gleanings culled from wayside nooks.

Homicide by Implication. Dr. Clarke, a famous traveler of about a century ago, tells of the following remarkable case which was tried at the Greek island of Cos: A young man desperately in love with a girl of Stanchio eagerly sought to marry her; but his proposals were rejected. In consequence of his disappointment he bought some poison and destroyed himself. The Turkish police instantly arrested the father of the young woman, as the cause, by implication, of the man's death. Under the fifth species of homicide, he became therefore amenable for this act of suicide. When the cause came before the magistrate, it was urged literally by the accusers, that "if he, the accused, had not *had* a daughter, the deceased would not have fallen in love; consequently he would not have been disappointed, consequently he would not have swallowed poison; consequently he would not have died. But he, the accused, had a daughter; and the deceased had fallen in love; and had been disappointed; and had swallowed poison; and had died."

Upon all these accounts he was called upon to pay the price of the young man's life; and this, being fixed at the sum of 80 piasters, was accordingly exacted.

Another instance was related to Dr. Clarke, which occurred at the island of Samos, as a characteristic feature of Turkish justice; that is to say, a sophistical application of a principle rigidly founded upon this fifth species of "homicide by implication." The Capudan Pasha reasoned with the people of Samos on the propriety of their paying for a Turkish frigate which was wrecked upon their territory, and the crew lost, "because the accident would not have happened unless their island had been in the way." 1 Desauss. Eq. viii.

"Lawed-over" Land. It is related that a lawyer in Massachusetts once purchased a bit of property that, as the saying is, had been "lawed over" for years. People wondered why he wanted to get hold of the property with such an incubus of uncertainty upon it. Others thought that perhaps he wanted some "legal knitting work," and would pitch in red-hot to fight that line-fence question.

That was what the owner of the adjoining land thought. So he braced himself for trouble when he saw the lawyer coming across the fields one day.

"What's your claim here, anyway, as to this fence? asked the lawyer.

"I insist," said the neighbor, "that your fence is over on my land 2 feet at one end and 1 foot, at least, at the other end."

"Well," said the lawyer, "you go ahead just as quick as you can and set your fence over. At the end where you say that I encroach on you 2 feet, set the fence on my land 4 feet. At the other end push it on my land 2 feet."

"But," said the neighbor, "that's twice what I claim."

"I don't care about that. There's been fight enough over this land. I want you to take enough so you are perfectly satisfied, and then we can get along pleasantly. Go ahead and help yourself."

The man paused, abashed. He had

been ready to commence the old struggle tooth and nail, but this move of the lawyer stunned him. Yet he was not to be outdone in generosity. He looked at the lawyer.

"Squire," said he, "that fence ain't going to be moved an inch. I don't want the land. There wasn't anything in the fight anyway but the principle of the thing."

Silence is Golden. A New York lawyer, whose business sometimes takes him to the West, tells this one:

A stolid blank-looking Indian sat in a Federal court room to be arraigned for bootlegging. His case was called. The marshal told him to stand up; he only stared, apparently not comprehending. The marshal motioned him to rise. He stood.

"What is your name?" the judge asked.

No reply.

"Have you an attorney?"

Only a helpless stare from the Indian.

"Can you understand English?"

Silence on the part of the prisoner.

"Mr. Attorney, what is this man charged with?" asked the judge.

The district attorney stated the case.

"It seems to me," said the judge, "that this is a very trivial case. The poor thing doesn't seem to understand a word of English. He probably has no understanding that he has done wrong. Mr. Attorney, just enter a *nolle prosequi* in this case."

The Indian was told that he could go. He stood staring and motionless. The marshal with a gesture ordered him to sit down. He obeyed, and stayed throughout the long afternoon session of court. In one case, the charge was similar to his own. A noted local lawyer was defending. He entered a plea of guilty for his client, and then made an impassioned appeal for mercy. His pathos would have moved a marble statue. He represented long and earnestly the wonderful virtues and manifold kindnesses of his client. When he sat down, the judge said:

"Five years in the penitentiary."

Court adjourned, and as the crowd passed out the Indian followed. He walked down the steps behind the lawyer for the man who had just been sentenced. Suddenly he leaned over and whispered in the attorney's ear:

"White man talk too darn much."

A Happy Debtor. It is the law throughout India that no native may be arrested after sundown, one object of this regulation being to prevent what is known as dacoiting, which is a form of brigandage generally practised by night. Just before I came away, a local native merchant took advantage of the law in a fashion which caused considerable amusement, which its victim, however, found difficulty in sharing.

These native merchants do things in a big way and think nothing of dropping in casually and placing orders for goods to the tune of $50,000, but in some cases, footing the bill, when it is presented, is another matter. The merchant in question, who had contracted quite a sizable debt, proved so reluctant about settling that eventually the disgusted creditors swore out a warrant for his arrest. As soon as the debtor heard, however, that the warrant was out, he foiled the intention to arrest him by the simple expedient of staying at home all day until after sundown. And then, by way of rubbing it in on his creditor, he had a carriage and pair brought round and spent the rest of the evening in driving back and forth in front of the house of the baffled and enraged creditor. It was impossible to break into his place and arrest him because the law does not permit such a course to be followed in the case of debt. And all through the day the creditor, if he cared to look out of his upper windows, could see his annoying debtor sitting calmly in his garden, smoking his pipe and beguiling himself in other exasperating fashions. He could, as a matter of fact, have paid at any time, for he was one of the richest men in the neighborhood, but he just obstinately wouldn't, nor did he until some weeks afterward, when he wanted to make a journey and had to start by day. Then he sent his agent around with the money and thus closed the incident.—Buffalo Express.

In Vacation. Having thus ascertained, wrote Bleckley, Ch. J., in Fouche v. Harison, 78 Ga. 405, 3 S. E. 330, that the case tried was the main bill, and it alone, we are prepared to rule on the motion made to dismiss the writ of error, our decision upon which was reserved until after the whole case was argued, because of the bewildering intricacy of the amendments, orders, exceptions, etc., etc., the record being a swarming hive of professional industry and fecundity. Until this record came before us, we had no adequate conception of our brother Miller's energy; and he doubtless will never have any conception whatever of the torture which his energy has cost the writer of this opinion, whilst he, the writer, was supposed to be taking his ease in the romantic wilds of upper Georgia. A skeleton in one's closet is nothing to such a record in one's trunk in full view of the mountains.

The Lien That Liened Too Far. In Indiana Powder Co. v. St. Louis, K. C. & C. R. Co. 116 Mo. App. 364, 92 S. W. 150, the court determined, in conformity with the contention of appellant's counsel, that one who furnished to a contractor blasting powder, for the purpose of quarrying rock, which was afterwards crushed and delivered to a railroad company and used in ballasting the latter's roadbed, was not entitled to claim a lien upon the railroad therefor.

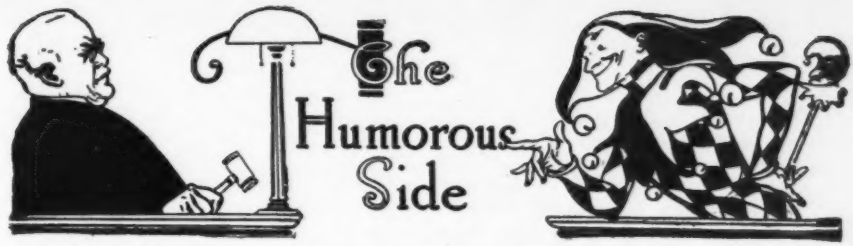
Not only was the law of appellant's counsel good, but so are the following lines that appear in their brief:

This is the Road the Company built.
This is the Ballast of Stone they spilt
Along the Road the Company built.
This is the Mill on the far-away Hill,
Which crushed the Ballast of stone they spilt
Along the Road the Company built.
This is the Man with crowbar and drill,
Who quarried the Rock which was crushed by the Mill,
That made the Ballast of stone they spilt.
Along the Road the Company built.
This is the Powder and Dynamite Fuse,
That the Man with crowbar and drill did use
To quarry the Rock that was crushed by the Mill,
Which the Oil soothed on the far-away Hill
To crush the Ballast of stone they spilt
Along the Road the Company built.
This is the Lien that pays all the bills,
The Fuse and the Powder, the Man with the drills,
The Oil and the Steam to run the Mills,
Whether near or far on a thousand hills,
Just so the railroad foots the bills,
To crush the Ballast of stone they spilt
Along the Road the Company built.

L'ENVOY

See what a medley this plaintiff doth mix,
To whom we expect the Court to say "NIX!"
His powder blew off on so distant a scene
That it left of his men but the smoke of a dream.

Protracted Exercise of Jurisdiction. In refusing to decree specific performance of a contract for personal services involving the exercise of skill, judgment, and discretion, continuous in their character, and running through a period of ninety-nine years, the court in Greer v. Pope, 140 Ga. 747, makes this entertaining remark: "Hitherto the case of Jarndyce v. Jarndyce, as reported by Dickens in "Bleak House," has been considered as the typical illustration of the protracted exercise of jurisdiction over a case by a court of chancery. But if the superior court, in the exercise of its equitable power, should undertake to decree the specific performance, for nearly a century, of the contract under consideration, and to supervise its proper execution during that time, the celebrated case mentioned would cease to occupy its bad pre-eminence."



"E'en grim-visaged Law can smooth his wrinkled front and smile."

He Had Kissed the Stone. An Irish magistrate, one of the old school, was summing up a case in a Dublin court. The plaintiff was a handsome woman and her good-looking daughter was one of the witnesses.

"Gentlemen of the jury," said his honor, "everything in the case seems plain,—except, of course, Mrs. O'Toole and her charming daughter."—Liverpool Post.

Too Trusting. Carefully the burglar effected an entrance into the bank. He found the way to the strong room. When the light from his lantern fell on the door he saw the sign:

"Save your dynamite. This safe is not locked. Turn the knob and open."

For a moment he ruminated.

"Anyhow, there's no harm in trying it, if it is really unlocked."

He grasped the knob and turned.

Instantly the office was flooded with light, an alarm bell rang loudly, an electric shock rendered him helpless, while a door in the wall opened and a bulldog rushed out and seized him.

"I know what's wrong with me," he sighed an hour later, when the cell door closed upon him. "I've too much faith in human nature,—I'm too trusting."—Rochester Evening Times.

A Surprised Justice. In a New England town a local celebrity was brought up before the justice for stealing chickens. The prisoner was noted for never telling the truth when he could help it and consequently there was general surprise when he pleaded guilty. It evidently staggered the justice. He rubbed his glasses and then scratched his head. "I guess—I'm afraid—well, Hiram," said he, after a thoughtful pause, "I guess I'll have to have more evidence before I sentence you."

Share and Share Alike. A Southern lawyer of prominence recently went to Chicago to become general counsel for a big lumber company. Having been reared in Kentucky, and being an old-fashioned Democrat, he rather prides himself on the fact that he has always lived in a state of Jeffersonian and Jacksonian simplicity.

After the family had moved North and taken a home, it was decided that the household would not be complete without a butler. An advertisement was inserted in the paper inviting applicants to call. Almost the first to answer the advertisement was a dapper negro. His references proving satisfactory, it seemed probable that he would be engaged.

"Does you 'spect me to wear mah full dress suit ever' night at dinner?" he asked.

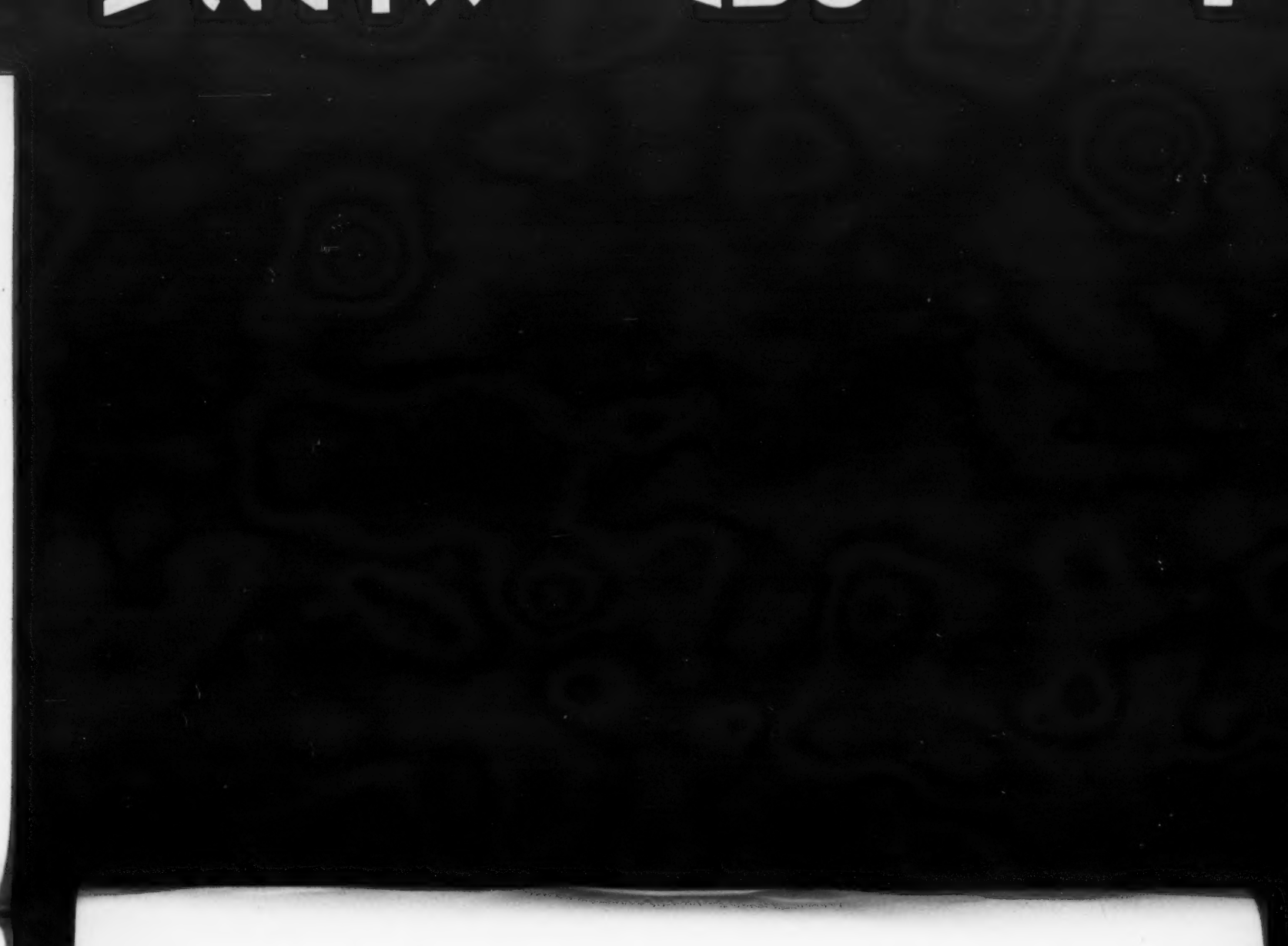
"Well, no," answered the lawyer, "On nights when we have company I'd like for you to let me wear it."—Saturday Evening Post.

For a Song. Police Lieutenant Hanlin was reading a report at his desk when he was disturbed by a commotion at the door. Looking in that direction, he saw a big negro being pushed in through the door by Officer Murphy. The negro's head was bleeding.

"Well, what have you been up to?" said the lieutenant, severely.

"Ah ain' done nothin'," replied the negro.

"You must have done something or you wouldn't be in that state, and you wouldn't have been run in."



"Hones' to Gawd, boss, Ah ain' done nary thing. Naw, suh."

"Well, you must have said something, then."

"Ah ain' say nothin' and Ah ain' done nothin'. Ah was just walking 'long singing, 'Ireland must be Heaven, for my mother came from there,' when 'long come somethin' and hit me side de haid. When I wake up this here officer had done got me."—New York Evening Post.

Different Methods. The prison visitor on his usual rounds noticed that a new man occupied a cell that had been empty for some time.

"My friend," he began, "may I ask what brought you here?"

"The same thing that brought you here," replied the convict; "a desire to poke my nose into other people's business, only I generally used to go in by the basement window."

Both Appropriate. Longmore: "The former clients of Smith, the divorce lawyer who died last week, are going to do a nice thing."

Short: "What?"

Longmore: "Show their appreciation by erecting a monument to his memory."

Short: "Have they chosen the design?"

Longmore: "Not yet. A number of them want something along the lines of the statue of Liberty, and the others favor a colossal granite cleaver."—The Lamb.

His Rights. "Why did you strike this man?" asked the judge sternly.

"He called me a liar, your Honor," replied the accused.

"Is that true?" asked the judge, turning to the man with the mussed-up face.

"Sure, it's true," said the accuser. "I called him a liar because he is one, and I can prove it."

"What have you got to say to that?" asked the judge of the defendant.

"It's got nothing to do with the case, your Honor," was the unexpected reply. "Even if I am a liar, I guess I've got a right to be sensitive about it, ain't I?" —Topeka State Journal.

Taking Him Down. A lawyer with a liking for billiards had occasion recently to visit a small town in the west of Scotland. While there, seeking to pass the time, he found a new and excellent billiard table. Upon inquiring if there was anybody about who could play, the landlord referred him to one of the natives. They played several games, but the result was against the lawyer. Try as he might, the countryman won every game.

"Mr. —," the lawyer remarked, "I've quite a reputation at home. They consider me a good billiard player, but I'm not in your class. May I inquire how long you have played?"

"Oh, for a while back," replied the native. "But, I say, I dinna want to hurt yer feelin's, but you're the first fellow I ever beat!"—London Tit-Bits.

Discreet. In a Kentucky town on the edge of the mountains the crowd at the postoffice was discussing the latest homicide. Uncle Luther Williams, ripe in years and experience, approached the group, and someone turned to him.

"Uncle Luther," he inquired, "how do you stand in regard to this killing yesterday? Don't you think something ought to be done about it?"

"My son," said Uncle Luther, "I'm plumb hostile to all killin's whatsoever. But if 'Bad Bud' Menifee had to kill somebody, it seems like to me he was powerful discreet in the choice he made yistiddy."—Saturday Evening Post.

No Wonder He Stammered. The man stammered painfully as he stood in the dock at the police court. His name was Sissons, and it was very difficult for him to pronounce.

He had had the misfortune to stay out late and make an uproar the previous night, so that he had to account for it before the magistrate next morning.

"What is your name?" asked the magistrate.

Sissons began to reply:

Sss-ss-ssss-sss—"

"Stop that noise, and tell me your name," said the magistrate, testily.

Sss-ss-ssss-sss—"

"That will do," growled the magistrate, severely. "Officer, what is this man charged with?"

"Begorra, yer worship, I think he's charged wid sodywather!" replied the policeman, earnestly.—Rochester Evening Times.